



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ngumbi v Maina (Civil Appeal 30 of 2021)
[2023] KEHC 2401 (KLR) (16 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL 30 OF 2021

MW MUIGAI, J

MARCH 16, 2023

BETWEEN

JOSEPHINE WAUSI NGUMBI APPELLANT

AND

JANE NJERI MAINA RESPONDENT

*(Being An Appeal From The Judgment And Decree Of The Senior Resident
Magistrates' Court At Kangundo By The Hon. C. Ocharo (Ms) (SPM)
Delivered On 17th February 2021 In Kangundo SPMCC No 716 Of 2019)*

JUDGMENT

Trial Court Record

Plaint

1. This suit was initiated by a Plaintiff dated 30.09.2019 in which the Plaintiff averred that on 7.04.2019 she was a fare paying passenger in motor vehicle registration number KBJ 253F heading to Nairobi along Machakos- Nairobi road near Kaani area when suddenly due to the negligence of the Defendant's driver, servant or agent in control of motor vehicle registration KCF 864G violently rammed onto motor vehicle registration number KBJ 253F and due to the impact, caused the Plaintiff grievous and severe injuries.
2. The negligence of the Defendant's driver, servant and/agent were particularized as follows;
 - a. Failing to take heed of other road users on the road.
 - b. Driving at an excessive speed in the circumstances without due care and attention to other road users particularly the motor vehicle registration number KBJ 253F.



- c. Veering off its lane on the highway onto the wrong lane and on the path of KBJ 253F causing the violent collision.
 - d. Failing to stop, slow down, swerve or in any other manner to control motor vehicle registration number KCF 846G so as to avoid ramming onto motor vehicle registration number KBJ 253F.
 - e. Causing the said accident by veering off the road and driving at a high speed and without proper look out for oncoming traffic and other vehicles on the road.
 - f. Failing to act in any other reasonable manner as to avoid ramming onto motor vehicle registration number KBJ 253F.
3. The Plaintiff particularized the injuries suffered as a result of the accident;
- a. Blunt and laceration on the face
 - b. Blunt soft tissue injuries to the chest
 - c. Lung contusion
 - d. Chest hemothorax (blood collection)
 - e. Extensive skin, muscle and tendon, loss on the right forearm (degloving injury)
 - f. Compound (open) fracture of right ulna
 - g. Disability of 60%
4. The Plaintiff contended that she suffered loss and damage and had to incur future medical expenses for healing of her hand. Further that she had suffered loss of earnings and diminished earning capacity particularized as follows;
- a. Being a business person, earning in excess of Kshs 5,000 daily, the Plaintiff may never be able to carry on her business involving a lot of travelling and physical output which is no longer possible for the rest of her life.
 - b. The Plaintiff's ability to work and earn income has been diminished due to the acquired incapacity.
5. The Plaintiff claimed loss of Kshs 150,000 per month.
6. The Plaintiff opined that the Defendant was vicariously liable for the accident and thus prayed for the following from the court;
- a. Special damages
 - b. General damages for injuries
 - c. General damages for loss of amenities, loss of earning and earning capacity
 - d. Costs of the suit plus interest on a,b and c at court rates.
 - e. Any other relief that the Hon. Court may deem fit to grant.

Statement of Defence

7. The Defendant entered appearance and filed its Defence dated 9.12.2019 denying in totality the contents of the Plaint. She contended that if the accident occurred, it was solely caused and or



substantially contributed to by the negligence on the part of the driver of motor vehicle registration number KBJ 253F whose negligence was particularized as follows;

- a. Driving at an excessive speed in the circumstances
 - b. Failing to exercise or maintain any or any sufficient or adequate control of motor vehicle registration number KBJ 253F so as to prevent the accident
 - c. Failing to take any or any effective measures to prevent motor vehicle registration number KBJ 253F from colliding with the Defendant's motor vehicle
 - d. Driving without due care and attention
 - e. Failing to keep any or any proper look out or to see or observe or heed the presence of the defendant's motor vehicle on the said road in sufficient time or at all to avoid the said accident
 - f. Failing to have any or any due regard to other road users
 - g. Failing to apply the brakes sufficiently or in time or at all
 - h. Causing or permitting the accident to occur.
8. The Defendant asked the court to dismiss the suit with costs.

Hearing

9. The Plaintiff called a total of three witnesses. PW1 was JANE NJERI MAINA, the Plaintiff. She adopted her statement filed on 12.11.2019 in which she stated that on 7.04.2019 she was a fare paying passenger in motor vehicle registration number KBJ 253F heading to Nairobi along Machakos-Nairobi road near Kaani area when suddenly due to the negligence of the Defendant's driver, servant or agent in control of motor vehicle registration KCF 864G violently rammed onto motor vehicle registration number KBJ 253F and due to the impact, caused the Plaintiff serious and grievous injuries.
10. She blamed the driver of the lorry/truck of motor vehicle registration KCF 864G for the accident as he or she did not exercise caution on the road and give consideration to other road users resulting in veering off the lane of the road and ramming into Nissan Matatu KBJ 253F
11. She stated that due to the accident, she endured a lot of pain and suffering, to date she is still in a lot of excruciating pain on the right arm which she had three surgeries but still unresponsive. She cannot do any form of work with the right upper limbs, has difficulty in sleeping and the doctors have advised that she should not involve herself in strenuous work leaving her in a destitute situation and permanently dependent on the support of other people.
12. She indicated that she incurred hospital bills, expenses and continues to seek medical services at high costs. She has also been advised that she will undergo a removal of metal plates operation which will cost approximately Kshs 120,000.
13. The Plaintiff further testified that after the accident she was rushed to Machakos Level 5 Hospital. She lives in Voi and was injured on the right eye, above and below the right breast was cut that is why she had to use a pillow to support the same. She was stitched and has to manage the pressure. Her chest cavity as injured, her right hand was seriously injured, a portion of the flesh was left. She had multiple bone fractures and had blood transfusion, a total of 6 pints.
14. She was transferred to Kikuyu hospital for her right hand and was in hospital for 3 months. She had a machine on her hand for 14 days because her hand started rotting. After two weeks grafting was done by removing skin from her thigh, metals were fixed for the two bones. She has to hold the ball to prevent



- the fingers from being stiff. She indicated that she was still undergoing treatment at Kikuyu Hospital and attends physiotherapy 4 times a week, she uses a vehicle because she cannot take public means, she hires and has to have an assistant. She stated that some of the receipts were not legible because of how they were handled.
15. She said the injury was coming together. Before the accident she was a business woman making ‘mabuyu’, she would supply to shops and sell from home. She sold the product in Voi, Taveta, Wundanyi, Eldoret and Nairobi. She earned about Kshs 5,000 per month and she is no longer able to do this after the accident, she closed the business because they had to spend all the money on treatment.
 16. husband stopped working because he has to take care of her. She is under total care, she cannot bath dress and carry out chores on her own. She said that she has gone through a lot since the accident, her hand is not ascertained whether it will function as it was before and is still being monitored. The family has not paid rent for over a year, her son deferred his studies for two years, they sold their vehicles.
 17. The Plaintiff was/ is feeding on food brought by those who visit her. She travelled from Voi with her husband who assisted her. She was examined by Dr Wokabi and went for a second medical examination by Dr. Maina Ruga. There were further medical costs of Kshs 120,000, medical ambulance services for which she was charged Kshs 19,400. She blamed the vehicle that hit them because it veered off its lane and pushed them off the road, KCF 846G.
 18. She produced the discharge summary, bundle of receipts, invoices from Kikuyu Hospital, copy of records, letters from Kikuyu Hospital, demand letter, Dr. Wokabi medical report and receipt, medical report by Dr. Maina Ruga, Letter from prime teleradiology solutions limited, ambulance services receipt.
 19. Upon Cross examination, she stated that they were travelling to Nairobi and she was seated at the right back seat. The collision was head on. I hit the whole of their vehicle’s right ride from the front to the rear. The vehicle she was in was not moving at a high speed but she could not tell the speed, she just heard the impact. She stated that her business was wholesale and retail. She did not have proof of doing such business. The Plaintiff stated that she would travel by train (SGR) because it got expensive hiring a vehicle from Voi, it was Kshs 2,000. They hired personal vehicles but there was no receipt. She knew that an invoice is not a receipt. She did not see what happened before or after the accident because she was shocked but she was conscious. She was not able to tell the last position of the vehicle. She has three children and the last born is at Pwani University, they are not employed. Her husband dealt in gem stones but is not working anymore. She did not know if the lorry driver was charged.
 20. In re-examination she stated that she received calls from her customers so she did not have any receipts. She said there was no doubt that they hired vehicles, her husband quit his job and her family had been seriously affected.
 21. The two medical reports, list of document and a further list of documents were produced by consent on 27.7.2020
 22. PW2 , Pius George Maina adopted his statement filed on 12.11.2019 in which he stated that he is the Plaintiff’s husband and the Plaintiff was very productive before occurrence of the accident and used to earn approximately Kshs 5,000 per day from her business. He said he had incurred a lot of expenses in terms of medical bills and other logistics owing to the Plaintiff’s state as she cannot take care of herself. The loss of income and support from the Plaintiff has stained their family. He lost the companionship he used to enjoy from the wife as she has been physically incapacitated necessitating constant and perpetual care.



23. He indicated that he had to abandon his business of dealing in buying and selling gemstones and this has affected his income and standard of living and that of his family. It was his testimony that he has suffered a lot of inconvenience as he is required to travel from Voi to Kikuyu to take the Plaintiff for frequent mandatory medical check up at P.C.E.A Kikuyu Hospital. He prayed for the prayers to be allowed as pleaded in the Plaint.
24. Upon cross examination, he stated that his wife earned Kshs 5,000 per day, the payments were through Mpesa and cash so there is no receipt of documents. The same can be found in her phone. He was not present when the accident occurred. She was with his wife for the two and half months she was in hospital. He rented a house. They hired vehicle to hospital. She never used SGR.
25. Upon Re-examination, he stated that he rented a house in Kikuyu. The SGR Receipts were for their transport but they are few, most times they hired vehicles. He said they sold their plots and vehicles. He stopped working to take care of his wife. He is the one doing the house chores and stated that for the pain and suffering, she should be compensated.
26. PW3, PC ONGANGA ZACHARY attached to Machakos Police Station on traffic duties stated that at around 1400 hours at Kanaani area along Machakos Nairobi road, one Jackson Mutua was driving KCF 846G an Isuzu from Nairobi and on reaching, the front right tyre burst before hitting an oncoming vehicle KBJ 235F, Toyota Hiace as a result passengers were injured, one of them being JANE NJERI MAINA. Police officers proceeded to the scene and towed the vehicles to the station for inspection while passengers were rushed to Machakos Hospital. He produced a police abstract.
27. Upon Cross- examination, he stated that he did not visit the scene, he was already at Machakos Police Station. He could not confirm if sketch maps were drawn, he did not have the inspection reports and he could not confirm if the driver was charged but according to the police file he was not. He was among the injured. He could not tell the last resting position of the two vehicles or how the accident occurred.
28. In re-examination, he stated that from the OB extract, the investigating officer blamed the vehicle KCF 846 G for the accident.
29. The Defence did not call any witness.
30. The Plaintiff made an application to amend the number plate of the vehicle to KCF 846G and not KCF 864G which was allowed.

Trial Court Judgment

31. The Trial Court delivered its judgment on 17.2.2021 and on the issue of liability, found that the Plaintiff as a fare paying passenger in a vehicle could not in any way be blamed for the accident. It found that apportionment of liability could only be among the drivers of the vehicles involved in the collision. Further, the Defendant did not join the driver into the case and did not offer an explanation as to how the accident may have occurred so the only version is that given by the Plaintiff. The court also found that failure to charge the driver of KCF 846 G with a traffic offence does not abdicate him from liability. The Defendant was thus found wholly liable for the accident.
32. On the claim for loss of earning capacity, the Trial Court found that no evidence had been presented to prove that the Plaintiff was engaged in selling mabuyu and earning Kshs 5,000 save for her husband's word. The Trial Court found that an award using the global award would be reasonable.
33. It was noted that despite the Plaintiff not explaining why she produced invoices instead of receipts, she was admitted and was discharged and must have cleared bills before discharge. It further noted that



some bills had been paid by NHIF and the invoices are duplicate of each other. Only Kshs 252,000 was billed to the patient which was awarded.

34. The Trial Court found that the claim for future medical expenses was specifically proven and pleaded and awarded the same.
35. As for general damages, being guided by the authorities cited, the medical reports, treatment notes and the evidence before the court as well as the cost of living and the inflationary trends, awarded Kshs 5,000,000.
36. In conclusion, judgment was entered in favour of the Plaintiff as follows;
 - a. General damages for pain, suffering & loss of amenities Kshs 5,000,000
 - b. General damages for loss of earnings Kshs 1,000,000
 - c. Special Damages Kshs 623,000
 - d. Costs
 - e. Interest from date of judgement

The Appeal

37. Dissatisfied by this judgment and decree, the Appellant filed a Memorandum of Appeal on 17.04.2021 in which he sought the following orders;
 - a. Spent
 - b. The judgment of the Trial Court passed on 17th February 2021 be quashed and/or set aside
 - c. The Hon Court proceeds to consider the facts and make its assessment of liability, quantum and costs.
 - d. The Respondent pays the costs of this Appeal and of the lower court case.
 - e. Any other relief deemed appropriate in the circumstances.
38. The Appeal is founded on the following grounds;
 - a. The Learned Magistrate erred in law and in fact in giving a narrow interpretation of the facts leading to an erroneous assessment of the issue of liability.
 - b. The Learned Magistrate erred in law and in fact as she failed to take into account the issue of liability which was not proved by the Respondent against the Appellant.
 - c. The Learned Magistrate erred in failing to consider the law on negligence and thereby erroneously finding the Appellant to blame at 100% liability.
 - d. The Learned Magistrate erred in law and in fact in awarding general and special damages when there was no legal basis for the award.
 - e. The Learned Magistrate erred in law and in fact in awarding general damages that were so excessive as to amount to an abuse of discretion.
 - f. The Learned Magistrate erred in law and in fact in awarding special damages that were far in excess of the amount proved.



- g. The Learned Magistrate erred in law and in fact in applying wrong principles in awarding both general and special damages.
 - h. The Learned Magistrate erred in law and in fact in totally ignoring the law and the submissions put in by the Appellant thereby arriving at a wrong decision on quantum of damages.
 - i. The Learned Magistrate misdirected herself on the applicable measure of award of general and special damages in favour of the Respondent
 - j. The Learned Magistrate erred in law and in fact in awarding damages that were so excessive as to represent an erroneous estimate of the loss suffered.
 - k. The judgment of the Learned Magistrate is against the law and weight of the evidence on record.
39. The Appeal was disposed of by way of written submissions.

Appellant Submissions

40. The Appellant filed submissions on 9. 12 .2022 in which she submitted on two main issues, liability and quantum. On liability, it was submitted that PW3 did not shed light on the confusion on the police abstract having contradictory information.
41. It was contended that the abstract stated that the outcome of the accident as “pending under investigations” while on top it stated “KCF 846G is to blame”. That he testified only to the extent that the accident was reported, he did not attend the scene of the accident nor did he provide any sketch notes or the investigation diary to show how the conclusion was arrived at. It was submitted that in the absence of the investigating officer’s evidence, the police file, investigation report or any sketch plan, a police occurrence book (OB), the evidence of liability is questionable.
42. Further, that the driver of the motor vehicle the Plaintiff was travelling in was not called to testify on the circumstances of the accident and as the respondent was seated at the back of the motor vehicle, she did not witness what transpired on the road ahead. The Appellant contended that the burden of proof was not discharged and to buttress this point relied on the case of *Bwire Vs Wayo & Sailoki* [2022] KEHC 7 KLR, *Kennedy Nyangoya vs Bash Hauliers* [2016] Eklr and *Anne Wambui Ndiritu vs Joseph Kiprono Ropkoi & Another* [2004] e KLR
43. On quantum, while relying on the case of *Catholic Diocese of Kisumu vs Sophia Achieng Tete* No 284 of 2001[2004] 2KLR 55 that the Appellant contended was on the circumstances under which the appellate court can interfere with an award of damages, it was submitted the award of Kshs 6,623,600 was manifestly high in the circumstances. For general damages for pain and suffering, it was submitted that an award of Kshs 900,000 would be sufficient compensation. Reliance was placed on the case of *Kakuzi Limited vs Stephen Njoroge vs Kenya Wildlife Service* [2020] e KLR where the Appellate court upheld an award of Kshs 1,000,000 and *Dedan Njoroge Mwangi & Nduta Grace vs Jane Wanjiru* [2020] Eklr where the court awarded Kshs 600,000 for injuries the Appellant said were similar to those sustained by the Respondent.
44. On loss of earning, the court was urged to set aside the award of Kshs 1,000,000 and award Kshs 600,000 as the global award and reliance was placed on the case of *Hamo Transporters company & Abdi Omar vs Dorcus Wanui Kiriro* [2019] e KLR. It was submitted that the testimony that PW2 was a sole breadwinner should be taken with a pinch of salt and seeing that he is part of the business and able bodied, he can oversee the functions of the business.



On special damages, it was submitted that the Respondent should only have been awarded what she paid for in terms of medical expenses and not what was pleaded without being proved. The award for medical expenses should have been Kshs 252,000 and not 500,000 as pleaded under the ‘particulars of loss and damages.’

Respondent Submissions

45. The Respondent filed submissions on 13.12.2022. The court was urged to disregard the Appellants authorities that were not quoted in the submissions at the Trial court as held in the case of Dinach Tabitha vs Kiria –ni Farm , Civil App no 15 of 2020. It was submitted that the court had a duty to analyze and re- access the evidence on record and reach its own independent decision as provided in Section 78 of the [Civil Procedure Act](#). the Respondent also cited that case of Selle vs Associated Motor Boat Limited Co [1968] EA 123 and Ocean Freight Shipping Co. Ltd vs Oakdale Commodities Ltd [1997] e KLR and further submitted that the award of damages can only be interfered with if discretion was not exercised judicially or where irrelevant factors were taken into consideration while disregarding relevant factors.
46. Under the head of liability, it was submitted that the Trial Magistrate correctly analyzed the available evidence in reaching a finding that the Appellant was 100% to blame for the accident. The Plaintiff testified that motor vehicle registration number KCF 846 G veered off its lane and violently crashed onto motor vehicle KBJ 253 in which she was a passenger and PW3 blamed the driver of KCF 846 G as the one to blame for the accident. It was contended that the Appellant did not calla any witness to rebut and explain her version nor contradict the evidence thus the evidence remained uncontroverted. To support this argument, the Respondent relied on the case of Shaneebal Limited vs County Government of Machakos [2018] e KLR.
47. It was submitted that the authorities cited by the Appellant were not applicable in this case. It was submitted that in the case Bwire Supra, there was no eye witness that testified unlike this case while in the case of Kennedy Nyangoya Supra,the court blamed the Appellant who was the driver of the lorry and the Deceased was the rider of the Motor cycle that caused the accident while in this case the Appellant did not tender any evidence on contribution on liability and did not join a third party to shoulder the blame with her. It was also submitted that in Anne Wambui Supra, the plaintiff did not have an eye witness and the police officer called was not the investigating officer and the Defendant called an eye witness and that is not relevant to this case.
48. On the issue of quantum , it was submitted that the authorities cited by the Appellant were not applicable as the Plaintiff's injuries in this case were more severe. It was submitted that the awards by the Trial Magistrate were proper in the circumstances of the case, nature of injuries and the prevailing economic situation including the state of inflation. Reliance was placed on the cases of Kemfro Africa Liited t/a Meru Express Service Gathogo Kanini vs A M Lubia and Olive Lubia [1982-88] 1K AR 727 at p 730, Njuga Consolidated Co. Limited & Another vs Lineth Cheutai Moritim [2019] eKLR, Edward Muiruri Gatete Mburu vs Susan Kitheka [2018] eKLR, David Kariuku vs Peter Kiaire Wambui & Another [2014] e KLR and John Mutwii Kiswili vs Isiah Nzyimi Kilanga & Another [2017] e KLR.
49. It was further submitted that that the award of general damages for loss of earnings was properly awarded in accordance with the parameters in the decision of Hamo Transporters company & Abdi Omar vs Dorcus Wanui Kiriro [2019] e KLR where a global figure of Kshs 1,000,000 was awarded.



50. On special damages, it was contended that the Trial Magistrate awarded the amount specifically pleaded and proved, the receipts matched the figures pleaded inclusive of future medical expenses contained in the medical report of Dr, Wokabi that was admitted by consent of the parties/Counsel on record.
51. The Respondent contended that the decision of the Trial Court should not be disturbed and the court was urged to dismiss the appeal with costs.

Determination

52. The Court considered the Memorandum of Appeal, the Trial Court record and the submissions of the parties in this Appeal.
53. This is 1st appellate court, as aptly stated in the case of *Selle & Another vs. Associated Motor Boat Co Ltd & Others* [1968] EA 123 should evaluate and/or assess the evidence on record as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

54. It is not in contention that an accident occurred on 7th of April 2019 involving registration number KBJ 253F in which the Respondent was a fare paying passenger that was heading to Nairobi along Machakos- Nairobi road near Kaani area when motor vehicle registration KCF 846G violently rammed onto motor vehicle registration number KBJ 253F and due to the impact, caused the Plaintiff grievous and severe injuries. The injuries sustained are also not in contention. The issues raised by the Appellant are with respect to liability and quantum. From the motor vehicle copy of records KCF 846 G belongs to National Industrial Credit Bank Limited and Josephine Wausi Ngumbi as at 20.08.2019. Therefore, ownership of the vehicle is established by prima facie evidence of registration.

Liability

55. On the first issue of liability. It is contended that the Respondent should also be apportioned blame for the accident. According to the Appellant, the burden of proof was not discharged as the driver of KCF 846 G was not charged and the police abstract indicated that the matter was pending under investigation. It has been said that failure to charge a person for an accident in a criminal case does not mean that the question liability did not arise. These are two distinct cases and liability maybe determined either in criminal or civil proceedings.
56. The burden of proof in civil cases lies with the Plaintiff. The Court of Appeal while dealing with this question in the case of *Mbuthia Macharia v Annah Mutua Ndwiga & another* [2017] e KLR observed that;

“The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift” to the party who would fail without further evidence?”



57. Blacks Law Dictionary, Sixth edition defines direct evidence as a piece of evidence often in the form of the testimony of witnesses or eyewitness accounts.
58. According to the abstract, the top left indicated that the person to blame for the accident is KCF 846G and this was buttressed by PW2's testimony. The Respondent who was an eye witness also blamed the Appellant for the accident. She gave direct evidence.
59. It does not help the Appellant that he did not produce any evidence to rebut this contention. As per PW2's testimony, the Appellant's motor vehicle front right tyre burst before hitting an oncoming vehicle KBJ 235F, Toyota Hiace as a result passengers were injured including the Respondent.
60. The Plaintiff PW1, Her Husband PW2 And PW3 Police Officer who produced the Police Abstract testified and they were subjected to cross examination for Trial Court to assess and evaluate the Witnesses demeanor and/or veracity of the evidence. The Defendant did not present any evidence. The court has no other evidence to compare these testimonies to and as such the evidence remains uncontroverted. With the only evidence on record, the court makes a reasonable conclusion of how the accident occurred.
61. If as the Appellant submitted that the driver of the vehicle where the Plaintiff was a passenger was not called to testify so as to apportion liability, the Defendant would have joined the said driver as a 3rd Party to the proceedings for the trial Court to determine and/or apportion liability between the 2 parties/drivers. In the present circumstances where the Respondent was a passenger, what could the Respondent have possibly done to have caused the accident as a passenger in one of the vehicles involved in the accident?
62. In Janet Kaphiphe Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni LJ.(as She then was)citing the decision in Edward Muriga Through Stanley Muriga vs. Nathaniel D. Schulter Civil Appeal No. 23 of 1997 held that:

“In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations...Section 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support the same by way of evidence.”

The Court finds no evidence to prove any of such particulars of negligence alluded to in the Defense. I therefore find no reason to disturb the Trial Court judgment as far as liability is concerned and uphold 100% liability against the Appellant.

Quantum

63. The second issue is that of quantum of damages. I am guided by the Court of Appeal case of Kivati v Coastal Bottlers Limited Civil Appeal No. 69 of 1984 where it was stated that;

“The Court of Appeal should only disturb an award of damages when the trial Judge has taken into account a factor he ought not to have or failed to take into account something he ought to have or if the award is so high or so low that it amounts to an erroneous estimate.”
64. The Appellant submitted that the award of Kshs 5,000,000 for General damages for pain, suffering & loss of amenities was manifestly high in the circumstances and an award of Kshs 900,000 would be sufficient. In the case quoted of Kakuzi Limited v Stephen Njoroge Mungai & another [2020] eKLR, the Respondent sustained the following injuries;Fracture left radius/ulna, Degloving injury



left forearm, Degloving injury right wrist joint, Degloving injury right knee and a deep cut wounds left thigh. Permanent disability was assessed at 40%. An award of Kshs 1,000,000 was given. The injuries sustained in the case of Dedan Njoroge Mwangi & another v Jane Wanjiru [2020] eKLR and the injuries sustained are not similar to those in this particular case.

65. In the case of Stanley Maore v Geoffrey Mwenda [2004] eKLR the Court of Appeal stated: -
- “.....Having so said, we must consider the award of damages in the light of the injuries sustained. It has been stated now and again that in assessment of damages, the general approach should be that comparable injuries should, as far as possible, be compensated by comparable awards keeping in mind the correct level of awards in similar cases.”
66. I have looked at the case of Samwel Kebati Osoro v Mohamed Antuly & another [2019] eKLR where a plaintiff with head injury left, fracture of the left radius, fractures of the right femur and left patella and a permanent disability arising from the incident is put at 60% was awarded a sum of Kshs.4,000,000/=.
67. From the discharge summary the date of admission is 15.4.2019 and the date of discharge was 3.5.2019, the second one indicates date of admission as 15.7.2019 and date of discharge as 19.7.2019. the letter dated 23.8.2019 from PCEA Kikuyu Hospital signed by Dr. Sang Edward who also confirms this position.
68. The injuries sustained are;
- a. Blunt and laceration on the face
 - b. Blunt soft tissue injuries to the chest
 - c. Lung contusion
 - d. Chest hemothorax (blood collection)
 - e. Extensive skin, muscle and tendon, loss on the right forearm (degloving injury)
 - f. Compound (open) fracture of right ulna
69. In addition, according to the medical report, the contention of 60 % is corroborated by the medical reports by Dr. Wokabi and Dr. Maina.
70. Furthermore, the injuries enumerated in the Plaint are the same as the ones indicated in the medical report dated 28.8.2019 by Dr, Wokabi. The doctor further notes that the Plaintiff suffered a lot of pain and blood loss and has suffered pain from the surgical procedures that were done. The Doctor notes that the Respondent will never be in a position to ever use the right upper limb to do any useful work. She requires physiotherapy even though she will gain slight improvement.
71. The medical Report of Dr. Maina Muga assessed the level of permanent incapacity at 60%. He noted that the Respondent suffered severe harm and sustained degloving injuries on right forearm with compound fracture of radius and ulna bones and cut wounds on the forehead, chest and breast. He also noted that the right forearm is disfigured and she has lost power and function in right forearm and hand.
72. I find that the Trial Court considered all the relevant factors in making its award on pain and suffering and have not been convinced as to any error that was made to warrant interference with the award given.



73. Under the award of loss of earnings, the Appellant contends that the Respondent did not provide any proof of earning capacity. I am guided by the Court of Appeal decision in *Mumias Sugar Company Limited vs Francis Wanalo* [2007] eKLR where 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 the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative 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 future. 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. 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 factors into account in order to ascertain the real or appropriate financial loss that the plaintiff has suffered as a result of the disability.

74. In *Butler V Butler* [1984] KLR 225 Kneller JA stated:

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in *Fairely vs John Thompson (Design & Contracting Division)Ltd*[1973] 2Lloyd’s Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

75. The court went on further to state that ;

“The principles to be considered in respect of a claim for loss of earning capacity as follows:

1. A person’s loss of earning capacity occurs where as a result of injury, his chances in the future of any work in the labour 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 for diminution of earning capacity is awarded as part of general damages.
3. Damages under the heads 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 then 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 improper 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 capacity 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; his disabilities and previous service if any.”
76. Disability as a result of the accident on the part of the respondent was assessed at 60 %. No doubt the respondent’s capacity to earn was greatly diminished. The Respondent did not prove that she was earning Kshs 5,000 per month and the Trial Court decided to award a global sum of Kshs 1,000,000 which the Appellant takes issue with and suggests Kshs 600,000 would be sufficient. The Respondent sufficiently explained how she had lost her earning capacity including her inability to use her right hand ever again. This state was also confirmed by the medical reports on record.
77. In the case of Catherine Gatwiri vs Peter Mwenda Karaai [2018] eKLR the court held that in arriving at an award for diminished earning capacity, the court will consider the disadvantage the respondent will suffer in future for not working because of the injuries and take into account factors such as age and qualifications of the injured person, remaining working life, disabilities among others.
78. In the case of case of Alpharama Limited vs. Joseph Kariuki Cebron [2017] eKLR the court stated as follows:-
- “The court would be properly entitled to make a global award because there is a general agreement in decisions rendered by courts that there is no formula for assessing damages for lost or diminished earning capacity provided the judge takes into account relevant factors.”
79. The age of the Respondent was not stated to enable the court determine how many more years she had to work. However making a comparison to the cases of John Kipkemboi & Another vs Morris Kedolo [2019] eKLR where the Respondent suffered amputation of the left leg and the court awarded a global sum of Kshs 1,500,000/= for loss of earning capacity and the case of Beatrice Anyango Okoth vs Rift Valley Railways (Kenya) Limited & Another [2018] eKLR where the plaintiff lost both lower limbs and the court awarded Kshs 2, 500,000/= for diminished earning capacity. I find that the award of Kshs. 1,000,000 was not manifestly high.

Special Damages

80. With regard to special damages, it is trite law that special damages must specifically pleaded and proved. From the record, there are SGR tickets for Ibrahim Ndungu dated 12.5.2019, Mike Maina and Jane Njeri dated 23.10.2019, Jane N. dated 12.9.2019, Sylvia Maina dated 8.9.2019 all of Kshs 700. There are some ineligible receipts thus the court cannot decipher what they are for.
81. Also, produced was also a receipt for heritage center dated 17.9.2019 for Kshs 70,000, another dated June 2019 for Kshs 70,000, deposit for admission of Kshs 5,000, various Kikuyu Orthopedic receipts of Kshs 11596 for those that were legible Kikuyu General Unit of Kshs 36,837, Kshs 300, Machakos Level 5 Hospital 1600, Mama Kelly’s Kitchen receipts totaling to Kshs10,010 and a deposit receipt of Kshs 100,000. There are interim invoices summary from PCEA Kikuyu Hospital but the same has no stamp or signature and it is not clear whether this were the final bill. This court has also seen receipts from Dr. Wokabi for Kshs 2500, Red cross receipt dated 8.04.2019 of Kshs 19,400. The total amount proved according to the receipts produced culminates Kshs.330,443.



FUTURE EARNINGS

82. The governing principle for awarding damages for the future medical expenses was explained by the Court of Appeal in Kenya Bus Services Ltd v Gituma [2004] EA 91 as follows;

And as regards future medication (physiotherapy) the law is also well established that, although an award of damages to meet the cost thereof is made under the rubric of general damages, the need for future medical care is itself special damages and is a fact that must be pleaded, if evidence thereon is to be led and the court is to make an award in respect thereof. That follows from the general principle that all losses other than those which the law does contemplate as arising naturally from the infringement of a persons legal rights should be pleaded.

83. Dr. Wokabi indicated in his medical report that the removal of plates will cost Kshs 120,000 in a medium cost hospital or nursing home even though the Respondent pleaded Kshs 150,000 in the Plaintiff. The award of Kshs 120,000 that was proved bringing the total of special damages to Kshs 450,443. I therefore substitute the award of special damages from Kshs 623,600 to Kshs 450,443.

84. Costs shall be borne by each party as the Appeal was partly successful.

85. In the end, I award as follows;

- g. General damages for pain, suffering & loss of amenities Kshs 5,000,000
- h. General damages for loss of earnings Kshs 1,000,000
- i. Special Damages Kshs 450,443
- j. Costs in the Trial Court
- k. Interest from date of judgment

**DELIVERED SIGNED & DATED IN OPEN COURT IN MACHAKOS ON 16TH MARCH 2023
(PHYSICAL/VIRTUAL CONFERENCE)**

M.W.MUIGAI

JUDGE

In the presence of:

Muthiu for the Appellant

Tuma for the Respondent

Geoffrey/patrick - Court Assistant (s)

We pray for 30 days stay of execution.

COURT: The Court grants 30 days stay of execution.

M.W.MUIGAI

JUDGE

16/03/2023

