



**Sharama v Reliance Freight Services Ltd & another (Civil Appeal  
E088 of 2022) [2023] KEHC 1486 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1486 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E088 OF 2022  
JWW MONG'ARE, J  
MARCH 2, 2023**

**BETWEEN**

**ZAINAB ROBA SHARAMA ..... APPELLANT**

**AND**

**RELIANCE FREIGHT SERVICES LTD ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MWANDIKA MWENDWA ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Judgement and decree by Hon. B.K. Kiptoo (SRM) in Eldoret  
Chief Magistrate's Court Civil Case No. 485 of 2020 dated the 3rd day of June, 2022)*

**JUDGMENT**

1. The appeal before this court stems from the judgment of the trial court in Eldoret Chief Magistrate's Court Civil Case No. 485 of 2020 where the Appellant instituted a suit against the Respondents by way of plaint dated 6<sup>th</sup> June, 2020. The Appellant was seeking general damages, special damages, future medical expenses and costs as a result of an road traffic accident that occurred along the Eldoret – Webuye road on the 24<sup>th</sup> May, 2019. In the suit before the trial court, the Appellant alleged that she sustained injuries as a result of said accident involving motor vehicle registration no KBQ 898G which knocked her down causing her to suffer grievous bodily injuries and loss.
2. The matter proceeded to full hearing and upon considering the evidence and the testimonies of the witnesses the trial court entered judgment in favour of the plaintiff as follows;

Liability 90/10

General Kshs. 3,000,000/-

damages:  
Special Kshs. 349,363/-

damages:  
Future Kshs. 448,200/-

Expenses:



Loss Kshs. 480,000/-

of  
Total: Kshs. 4,227,563/-  
future

Earnings Kshs. 427,756.30

10%  
Total: Kshs. 3,849,806.70  
Contributory

3. Being aggrieved with the judgment and decree of the trial court the Appellant instituted this appeal vide a memorandum of appeal dated 4<sup>th</sup> July 2022 premised on the following grounds;
1. The learned Magistrate erred in law and in fact by failing to properly and exhaustively valuate the evidence on record; hence he arrived at wrong inferences and conclusions.
  2. That the trial magistrate erred in both fact and law by making an award of general damages which is so inordinately low as to amount to a wholly erroneous estimate.
  3. That the learned trial magistrate erred both in fact and in law by failing to apply or applying wrong principles in assessment of damages thus awarding damages that were extremely low in the circumstance.
  4. The judgment of the learned magistrate is in the circumstance unfair and unjust.
4. The Respondents filed a cross appeal dated 18<sup>th</sup> January 2022 premised on the following grounds;
1. That the learned trial magistrate erred in fact and in law in holding the Respondents 90% liable contrary to the evidence on record.
  2. That the learned trial magistrate erred in fact and in law in failing to hold the Appellant wholly liable for the accident.
  3. That the learned trial magistrate erred in fact and in law in failing to dismiss the Appellant's case.
  4. That the learned trial magistrate erred in fact and in law in assessing general damages that were inordinately high.
  5. That the learned trial magistrate erred in fact and in law in using the wrong principles in assessing damages thereby arriving at a wrong estimate.

### **Appellant's Case**

5. On liability, learned counsel for the Appellant submitted that there was no evidence tendered to prove that the Appellant was negligent in any manner and as such the apportionment of 90/10 in favour of the Appellant was based on the wrong premises. She contest that the defendant was wholly responsible for the accident and that he should have been held 100% responsible for occasioning the accident.
6. Further, the appellant submitted that the 2<sup>nd</sup> defendant was found liable and charged with careless driving in traffic case. She urged that the fact that the Respondent's driver sped off from the scene of the accident and had to be restrained or detained by members of the public was an acknowledgement that he was aware that he was wholly responsible for causing the accident.
7. She submitted that even the police officer who visited the scene testified that she, the Appellant, was not to blame and thus, the learned trial magistrate erred in finding the Appellant negligent so as to contribute to the accident.



8. Counsel submitted that the Appellant had suffered 100% disability and that the trial magistrate erred by ignoring the injury to the mouth with avulsion of 6 teeth and blunt injury to the chest in assessment of general damages for pain and suffering.
9. The Appellant relied on the cases of *Beatrice Anyango Okoth v Rift valley Railways (Kenya) Limited & Another* (2018) eKLR and *Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited* (2016) eKLR in support of the submission that the trial magistrate's award was on the lower side and should be substituted with an award of Kshs.7,000,000/-.
10. Learned counsel for the Appellant urged that the trial court erred in awarding a sum of Kshs.448,200 on future medical expenses. He urged that the mistake of an advocate should not be visited on the litigant and pointed out that the amount pleaded in the plaint only contained the prices for the prosthesis but did not include operational costs. He referred the court to page 22 of the medical and submitted that the sum of Kshs.700,000/- was the cost for fitting a bilateral prosthesis. Further, he contended that the first quotation failed to include surgery expenses and doctors' expenses. He urged the court to award a sum of Kshs.1,400,000/- as future medical expenses.
11. Learned counsel for the Appellant submitted that the trial court erred in awarding a sum of Kshs.480,000/-. Further, that the Appellant provided documentation to the effect that she was working as a cleaner at Asis hotel where she earned a salary of Kshs.8,000/-. He urged that the court award her Kshs.1,920,000/- as she would have attended to her work up to the age of 70 years.
12. The Appellant urged the court to award Kshs.800,000/- for lost teeth and blunt force trauma to the chest as the trial court had failed to take the other injuries into consideration. He urged the court to award Kshs.120,000/- for an electric wheelchair as the trial court failed to make this award despite the Appellant providing a quotation for the electric wheelchair. In conclusion counsel urged the court to consider that the Appellant has 2 minors to take care of and is unable to cater for her basic needs. He urged the court to allow the appeal and enhance the award.

### **Respondent's Case**

13. The Respondents opposed the appeal and also filed a cross appeal against the award and judgement. Learned counsel for the Respondents submitted that the Appellant ought to have been found wholly liable for the accident. Counsel urged that the Appellant's evidence corroborated the 2<sup>nd</sup> Respondents' testimony that she suddenly started crossing the road without ascertaining whether it was safe to do so. Upon realizing that the vehicle was coming she ran and fell across the road resulting in the accident.
14. It was the Respondents case that without the sketch maps, police file or occurrence book there is no evidence as to how the accident occurred and as such casts benefit to the defence case that it is the Appellant who carelessly ran across the road.
15. Learned counsel further contended that the trial court erred in awarding Kshs. 3,000,000/- as general damages as it was inordinately high. Further, that the trial court considered the other injuries sustained when making an award for Kshs.3,000,00/- . He stated that the trial court erred in awarding Kshs.480,000/- as future medical expenses as the Appellant failed to specifically plead the same. He submitted that the award for loss of earning capacity must be proved on a balance of probability and given that the Appellant failed to produce documentary evidence of her salary, there was no basis upon which the trial court assessed and awarded the damages for loss of earning capacity.
16. On future medical expenses, learned counsel for the Respondent submitted that there was no basis for the award as neither of the doctors specialized in prosthetics and they could not explain the discrepancies in the quotations for the purchase prices quoted by the doctors. He urged the court to



award Kshs.200,000 which is within the price quotation for obtaining prosthesis. Further, that the claim for Kshs.120,000/- for a wheelchair having not been strictly proved, should be dismissed by the court. He urged that the appeal be dismissed with costs.

### **Analysis and Determination**

17. The Court of Appeal for East Africa set 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 particular 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

18. Upon considering the memorandum of appeal and the submissions of the parties, the following issues emerge for determination;
1. Whether the trial court erred in its apportionment of liability.
  2. Whether the trial court erred in its award of general damages
  3. Whether the trial court erred in its award for future medical expenses
  4. Whether the trial court erred in its award for loss of future earnings & earning capacity

#### **1. Whether the trial court erred in its apportionment of liability**

19. I have considered the testimony of the witnesses and the evidence tendered in the trial court and it is my view that the trial court did not err in its apportionment of liability. I note from the evidence on record the accident occurred during the day and whereas the Appellant was on her side of the road, she also had to be wary of other road users. I find that in apportioning liability at 90/10 in her favour the trial court considered the evidence of the eye witnesses as well. Whereas the Appellant was a pedestrian, she had a duty to also be careful while crossing the road. Therefore, the trial court did not err in apportioning liability at 90/10 in favour of the Appellant.

#### **2. Whether the trial court erred in its award of damages**

20. The principles guiding an appellate court in determining whether to interfere with an award for damages were set out in the celebrated case of *Butt v Khan* {1981} KLR 470 where the court pronounced itself as follows;

“An appellate court will not disturb an award for damages unless it is 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”.

21. It is trite law that when awarding damages, courts are to be guided by comparable awards for similar injuries. The Appellant sustained the following injuries; Blunt injury to the mouth with avulsion of 6 teeth. Blunt injury to the chest. Crushed both legs, amputated through the knee for the right and below the knee for the left. 100% permanent disability
22. In *Cosmas Mutiso Muema v Kenya Road Transporters Limited & Another* [2014] eKLR the Court awarded general damages for pain, suffering and loss of amenities in the sum of Kshs. 2,000,000/-. The Plaintiff in that case had suffered a crushed left leading to amputation below the knee, fractures to the cervical spine, fractures to the skull, fractures to the ribs, dislocation to the right knee and vertebrae amongst other injuries. The award was in 2014.
23. In *Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited* [2016] eKLR the Appellant suffered amputation of both legs, electrocution injury and electric burns on her neck and both legs. She suffered ninety-five (95%) per cent permanent disability, diminished capacity for work, increased dependence, loss of self-esteem and loss of ability to move without assistance. The appellate court awarded Kshs.5,000,000/-
24. The Appellant in this appeal has suffered 100% liability. Because of this disability, I am persuaded that for the rest of her life to be manageable, she needs to either be fitted with Prosthetics or will permanently be on a wheel chair. She need help to get around and also the help of an extra person to just get around her normal daily activities. She is not able to return to her old job nor can she find similar work. She has to either learn a new skill or entirely rely on the charity of others for her basic needs. In the case of *Peninah Mboje Mwabili v Kenya Power & Lighting Company Limited* [2016] eKLR the court took cognizance of the degree of incapacity in making its award. This case was decided over 10 years ago and the factors of inflation have set in making the purchasing power of the Kenya shillings diminished today. In deciding to interfere with the award of the trial court I am alive to the economic factors prevailing today. Therefore, applying the above principles to this case and considering the injuries suffered by the plaintiff and their resultant effects and taking into account the submissions and authorities of the parties, I am convinced that the award for general damages was on the lower side and hereby substitute it with one for Kshs.6,000,000/-

### 3. Whether the trial court erred in its award for future medical expenses

25. The court of appeal in *Tracom Limited & v Hassan Mohamed Adan* [2009] eKLR held as follows:

“...We readily agree that the claim for future medical expenses is a special claim though within general damages, and needs to be specifically pleaded and proved before a court of law can award it
26. I have perused the record of appeal and it is evident that the Appellant pleaded Kshs.448,200/- for future medical expenses. The appellant is asking the court to increase the award from that which the court found and while in its cross appeal and response to the appeal the respondents wants to have this reduced. While indeed the cost of future treatment may be more than what the trial court has awarded, it is difficult for the court to make an arbitrary assessment of the same without evidence. In her documentation before the trial court, the plaintiff pleaded for the sum as awarded by the court. It is trite law that parties are bound by their pleadings and therefore the court cannot interfere with the trial courts' decision on this head of damages.



#### **4. Whether the trial court erred in its award for loss of future earnings & earning capacity**

27. The trial court awarded a sum of Kshs.480,000/- for loss of future earnings upon considering the salary that the Appellant was earning. I have perused the record of appeal, the record of cross appeal and the documentary evidence in the trial court file and I note that the letter proving employment is listed as among the Appellants' list of document produced in court. The Appellant also testified that she was gainfully employed prior to the accident and worked as a general cleaner at Aziz hotel in Eldoret town. Indeed, it's her evidence that she had just alighted from a Matatu when the accident occurred and that she was coming from work. She also testified that having lost her husband she is the sole bread winner of her family and has minor children who depend on her entirely for their survival. She has lost the ability to use her legs and can no longer do the work that she did prior to the accident. For this reason I find the award under this heading merited and will not interfere with the same.
28. Overall upon perusal of the court record and the subsequent memorandum of appeal and cross appeal, I find that the appeal has merit and will allow it. I also find that the cross Appeal by the respondent is without merit and hereby dismiss the same.
29. Having found that the appeal is merited I make the following order
- a. Liability is apportioned at 90% in favour of the Appellant and 10% in favour of the Respondent.
  - b. General damages Kshs. 6,000,000
  - c. Special damages Kshs. 349,000
  - d. Loss of future earnings Kshs. 448,000
- Total Kshs. 6,797,363
- Less Kshs. 679, 736. 30
- Total <sup>10%</sup> Kshs. 6, 117,626.70  
contribution
30. Award of costs of this appeal to the Appellant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 2<sup>ND</sup> DAY OF MARCH 2023**

.....  
**J.W.W.MONGARE**  
**JUDGE**

In the presence of

1. N/A for the Appellant
2. N/A for the Respondent
3. Brian Kimathi- Court Assistant

.....  
**J.W.W.MONGARE**  
**JUDGE**

