



REPUBLIC OF KENYA



**Wangwa v Wanyonyi (Civil Appeal E005 of 2022)
[2023] KEHC 2151 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E005 OF 2022**

DK KEMEL, J

MARCH 22, 2023

BETWEEN

**ZACHARIA MARUTI WANGWA ALIAS ZACHARIA MARUTI
WANGWA APPELLANT**

AND

FRED WANJALA MABONGA WANYONYI RESPONDENT

*(Being an Appeal against the judgement and award of the Principal
Magistrate in Sirisia by the Honourable Caroline M. Wattimah
delivered on 15th December 2021, in Sirisia PMCC No. E001 of 2020)*

JUDGMENT

1. This appeal is against quantum of damages awarded by the trial Court in respect of an accident that occurred on or about 21st March 2020 at around 10.30 am. The Appellant herein was riding a motor cycle along Bungoma -Chwele road near Mayanja area when the Respondent by himself, agent or driver so negligently drove and/or managed the motor vehicle registration number KCQ 081 Y MITSUBISHI FUSO that it lost control in the process of its zig zag movement on the road and knocked down the Appellant and as a result the Appellant sustained serious bodily injuries indicated as: concussion; pains on the head; bleeding from left ear; painful neck especially at the back; pains in both shoulder joints; head injury-intracerebral bleeding; fractured skull; psychological trauma; cut wound scar over the left neck measuring 7×0.1 cm. He further noted his present complaints as follows: pains in both shoulder joints; pain on the left lower limb; lost memory and behaving abnormally. He claimed both general and special damages as well as future medical expenses.
2. Upon service of summons, the Respondent entered appearance and filed a defence seeking the dismissal of the Appellant's suit with costs and denied the occurrence of the alleged accident, sustained injuries and being guilty of the alleged negligence and in the alternative attributed the accident to the negligence of the Appellant.



3. On 14th July 2021, the parties recorded a consent order before the trial Court agreeing on liability at 25:75 in favour of the Appellant herein and which the trial Court duly endorsed and proceeded to receive evidence on the assessment of quantum of damages.
4. According to PW1, the Appellant herein, he is a secondary school teacher by profession and he wished to adopt his statement recorded on 2nd October 2020 as his evidence in chief and which the Court adopted it. He told the Court that the accident occurred on 21st March 2020 and that he was treated at Nabwala Health care then went to Brilliant Hospital and was lastly admitted at Life Care hospital where he stayed from 21st March, 2020 to 1st April 2020. He told the Court that he under went several tests and wished to produce in Court the following as listed below:
 - i. Radiology and a report dated 29th April 2020 as P. exhibit 1.
 - ii. Discharge summary as P. exhibit 2.
 - iii. P3 form as P. exhibit 3.
 - iv. Police Abstract as P. exhibit 4
 - v. Search as P. exhibit 5(a).
 - vi. Receipt for the search as P. exhibit 5(b).
 - vii. Medical report by Dr. Mulianga Ekesa as P. exhibit 6 (a)
 - viii. Receipt for the report as P. exhibit 6 (b)
 - ix. Brilliant medical check-up receipts for Kshs. 4,270/- and Kshs. 7,000/= as P. exhibit 7 (a) and (b) respectively.
5. He told the Court that he sustained injuries on the head, bleeding ears, pain on both shoulders, loss of memory sometime and still experiences pain. He further stated that he has chest pains and on sitting under the sun for long he experiences headaches. The doctor indicated long term counselling and follow ups.
6. On cross-examination, he told the Court that he is a literature teacher and that he teaches at Blossoms of the Savanna and he also teaches at Chebunyinyi ACK secondary School. He added that he teaches form 1, 2, 3 and 4. It was his evidence that he could not recall some of his students but recalls the years he went to university and his roommate. He stated that he has a fracture of the skull and which has healed partially. He stated that he was left with some disability on post-traumatic disorder and that he is undergoing counselling and which is not helping.
7. On re-examination, he told the Court that he could not recall some of his students and that he does not have a good memory that he sometimes forgets the name of teachers.
8. That was the close of the Appellant's case and there was no appearance by the Respondent.
9. The trial Court issued a judgment on quantum and which was Kshs. 1,000,000/= for general damages, Kshs 14, 770/= for special damages plus costs on the above figures and interest at Court rates from the time of judgement.
10. Aggrieved by the judgment of the trial court, the appellant filed its memorandum of appeal dated 31st January 2022. The grounds are essentially that:



- i. The learned trial magistrate erred in law and fact in awarding a meagre award of Kshs. 1,000,000/= as general damages as compared to the permanent severe injuries the Appellant suffered.
 - ii. The learned trial magistrate erred in law and fact in misapprehending the law and fact by denying the Appellant future medical expenses.
 - iii. The learned trial magistrate erred in law and fact in misapprehending the law and practice by making a finding that future medical expenses must be specifically pleaded before the same is proved.
 - iv. The learned trial magistrate erred in law and fact in denying the Appellant the award of loss of earning capacity when he was in danger of losing his job due to the severe injuries sustained.
 - v. The learned trial magistrate erred in law and fact in failing to appreciate the case laws tendered in Court under the loss of earning capacity and future medical expenses.
 - vi. The learned trial magistrate erred in law and fact in failing to consider the submissions tendered by the Appellant.
11. The Appellant prayed that this Court allow this appeal; set aside the lower Court's judgement and substitute the same with a judgement re-assessing the general damages upwards, and the costs of the appeal be awarded to him.
 12. At the hearing of this appeal, directions were taken to have both counsels file their respective submissions. That was duly complied with. This being the first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified see *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
 13. Counsel for the Appellant submitted that the appeal was competent and filed on time as the same was filed on 31st January 2022 but it ought to have been filed on 15th January 2022 while the trial Court judgement was delivered on 15th December 2021. Counsel relied on the case of *Francis Likhabila vs Barclays Bank of Kenya* [2020 eKLR. It was further submitted the failure to include a decree in the record of appeal was not fatal pursuant to Order 42 Rule 13 (4) (f) and the decision of *Matthew Owino Winja & Another v Joyce Atieno Ogdah* [2020] eKLR.
 14. It was submitted that the Appellant had proposed an award of Kshs. 6, 500,000/= for general damages for pain and suffering was sufficient and reasonable. Counsel relied on the case of *Terry Kenya Marangu v Wells Fargo Limited* [2014] eKLR; *Wanaina Mwaura Antony v Ibere Henry Mururu & 2 others* [2021] eKLR; *Mutinda Mutuku v Anne Nduku Mutua & Another* [2019] eKLR; *John Joel Koskei v Kenya Power & Lightning Co. Ltd* [2005] eKLR and *Weddy Kendy Kabira & Grace Muthoni Kobia v VM alia VM (a minor)* [2021] eKLR.
 15. On future medical expenses, it was submitted that the trial Court erred in not awarding the same holding that the Appellant did not plead the same despite the same being captured in the submissions and Plaintiff. It was further submitted that the Appellant was supposed to be awarded Kshs. 1, 500,000/= for future medical expenses. Counsel relied on the case of *Thomas K. Ngaruiya & 2 others v Davide Chepiro* [2012] eKLR.
 16. Under loss of earning capacity, Counsel submitted that the Appellant was a teacher by profession earning Kshs. 4,000/= per month and aged 28 years. He noted that the Appellant is likely to resign on medical ground meaning 32 years of service will have been wasted. He prayed for this Court to make an



award of Kshs. 15, 360,000/= and referred to the case of Caroline Endovelia Mugayilwa vs Lucas Mbae Muthara [2016] eKLR. It was further submitted that loss of earning capacity need not to be pleaded and Counsel relied on the case of Mwaura Muriuki v Suera Flowers Limited & Another [2014] eKLR. He urged this Court to allow this appeal with costs to the Appellant.

17. In response to the appeal, the Respondent submitted that the cited authorities before this Court were not referred to in the trial Court for it to make an award of Kshs. 6, 500,000/= thus the trial Court was not in error for not referring the authorities placed before it. Counsel relied on the case of Sila Tiren & Another v Simon Ombati Omiambo [2014] eKLR Eldoret HCCA No. 142 of 2011; Aloise Mwangi Kahari v Martin Muiya & Another [2020] eKLR Nakuru HCCA No. 50 of 2017 etc. This Court was urged not to be requested to use new authorities which were not placed before the trial Court for consideration.
18. It was submitted that the authorities relied upon the Appellant in this appeal, the parties sustained severe injuries than those in this instant appeal. Counsel urged this Court to examine the authorities before the trial Court and that it ignores the authorities cited in the appeal. The decisions were that of: Terry Kanyau Marangu v Wells Fargo Limited [2014] eKLR where the Court made an award of Kshs. 3, 600,000/= as general damages. Counsel submitted that the injuries in this matter were extremely severe with devastating complications and was not a proper guide in this matter. On the second case of Wainana Mwaura Antony v Ibere Henry Mururu & 2 others [2021] eKLR Narok HCCA No. 30 of 2019 the Plaintiff was awarded Kshs. 3,000,000/= as general damages. It was submitted that the injuries sustained in this case were completely different from those in this instant appeal. The same was the situation with the case of GA (Minor suing through her father and next friend BZ) v Paul Muthiku [2020] eKLR Mombasa HCCA No. 138 of 2018.
19. It was submitted that this Court ought to consider the decisions relied upon by the Respondent in the trial Court and find that an award of Kshs. 1,000,000/= as general damages was appropriate and that the Appellant has failed to demonstrate that the trial Court took into account irrelevant factors or left out a relevant factor of the amount awarded was inordinately low or high.
20. It was submitted that the Appellant's Pleat did not specifically plead future medical expenses a no sum was ever pleaded. According to Counsel, the report attached by the Appellant only indicated that he required long term counselling and follow up but not a breakdown of how much the same will cost and that the same was not suggested by evidence as no costs were indicated in the medical report. The Appellant only mentioned in his submissions that he would require Kshs. 1, 500,000/= as future medical expenses and which could not be awarded as it was not specifically proved and the award of Kshs. 1,000,000/= did factor in the future medical expenses. Counsel submitted that the correct legal position is that future medical expenses or costs ought to be pleaded, proved and prayed for. Counsel relied on the case of Trancom Limited & Another v Hassan Mohamed Adan [2009] eKLR; Simon Taveta v Mercy Mutitu Njeri [2014] eKLR (CACA NO. 26 of 2013) and other cases.
21. On loss of earning capacity, it was submitted that the same ought not to be pleaded as the same was general damages but the Appellant was to establish basis, provided evidence for such an award to be made. It was submitted that the Appellant did not provide evidence that he was demoted or that his employment had otherwise been adversely affected. The medical evidence produced in Court did not show any degree of incapacity given and that the Appellant was likely to be unable to proceed with his profession as a teacher due to the sustained injuries. It was submitted that without any evidence that the Appellant had lost his capacity to earn, no award under this head was capable of being made. Counsel relied on the case of Kenblest Kenya Limited vs Musyoka Kitema (2020) eKLR Kiambu HCCA No. 136 of 2016. Counsel urged this Court to dismiss the appeal with costs to the Respondent.



22. I have duly dispensed with my duty as an appellate Court to reconsider all the evidence and testimonies on the record afresh. I have further considered the submissions by the parties' advocates and having done so, I find it appropriate to restate the legal principle on exercise of discretion by a superior Court over jurisdiction of a subordinate Court or inferior Tribunal. This principle is best summed up by Sir Clement De Lestang, VP in *Mbogo v Shah* 1968 EA 93, where he held as follows: -

“I think it is well settled that this court will not interfered with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”

23. On the issue of an appellate court interfering with a lower court's assessment of damages, the court in the case of *Butt v Khan* 1982 -1988 1 KAR pronounced itself as follows: -

“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 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.”

24. This Court in *P. J. Dave Flowers Ltd v David Simiyu Wamalwa* Civil Appeal No. 6 of 2017 [2018] eKLR rendered itself on the matter of assessment of quantum as below: -

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

25. In the present appeal, the Respondent suffered injuries of the nature described below:

- i. Concussion.
- ii. Pains on the head.
- iii. Bleeding from left ear.
- iv. Painful neck especially at the back.
- v. Pains in both shoulder joints.
- vi. Head injury-intracerebral bleeding.
- vii. Fractured skull.
- viii. Psychological trauma.
- ix. Cut wound scar over the left neck measuring 7×0.1 cm.

26. In reaching her decision, the learned trial magistrate noted that he proposed Kshs. 6, 500,000/= award as general damages were overly excessive and proceeded to make an award of Kshs. 1,000,000/=. She proceeded to hold that the Appellant did not plead future medical expenses and loss of earning capacity



and concurred with the Respondent that future medical expenses were not pleaded but she considered the same in awarding general damages taking cognizance of the medical report by Dr. Ekesa that the Appellant required long term follow up and counselling. On loss of earning capacity, the trial Court held that the Appellant failed to prove the award for loss of earning capacity as there were no post-accident effects on his job and proceeded to award Kshs. 14, 770/ on special damages.

27. In the English Court in the case of *West (H) & Son Ltd v Stephard* [1964] AC 345 it stated as follows: -

“But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general 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 it still must be that amounts which are awarded are to a considerable extent conventional.”

28. Similarly, the Court in *Ramadhan Kamora Dhadho v John Kariuki & another* Civil Appeal No. 27 of 2015 [2017] eKLR opined thus: -

“There is no amount of compensation which can restore or renew the physical frame of the victim arising out of injuries occasioned in an accident. Secondly, the assessment and award of damages should not be construed as punishment to the defendant who has been held liable for the claim. Thirdly, while exercising discretion courts should endeavour to be moderate underpinning the decision on the well settled principles to avoid disparity on similar cases and facts.”

29. The Appellant sustained injuries on head, bleeding in the ears, injuries to both shoulders, fracture of the heel, cut on the leg and loss of memory. A perusal of his treatment notes, discharge summary and the latest doctor’s report. They all established that the Appellant sustained moderate head injury subject to a road traffic accident. Further, it was indicated that he experienced reduced level of consciousness, bleeding from left ear and scalp, episodes of projectile vomiting, deep cut wound on left heel. The CT scan noted that he sustained a left temporal depressed fracture and right frontal intracerebral haemorrhage which the P3 form classified as grievous harm. The medical report by Dr. Ekesa concluded that the Appellant sustained injuries which were brain related and posttraumatic stress disorder. He noted that the Appellant required long term follow up and counselling. The Appellant suggested an award of Kshs. 6, 500,000/= while the Respondent suggested an award of Kshs. 500,000/=. The trial Court proceeded to make an award of Kshs. 1,000,000/= on general damages terming the Appellant’s suggestion of Kshs. 6, 500,000/= as overly excessive.

30. On loss of earning capacity, it was essential for the Appellant to prove to this Court beyond reasonable doubt that the injuries sustained as a result of the accident interfered with his resumption to work or that the injuries sustained made him to likely lose his job. There was no medical evidence availed to substantiate the same. Both cases relied upon by the Appellant clearly indicated that medical evidence was availed to show that the injuries by the parties interfered with their capabilities to continue in employment or even secure employment elsewhere.

31. Taking cognizance, the arguments by the Respondent that this Court can only examine the authorities dealt with by the trial Court and that this Court cannot fill in the gaps left by inadequate guidance given to the trial Court has some basis.



32. In the case of Alex Wanjala v Pwani Oil Products Limited & Another [2019] eKLR where the Appellant sustained a closed head injury leading to loss of consciousness for several weeks, closed fracture of the right humerus and closed fracture of the right femur with the Court awarding Kshs. 600,000 for general damages.
33. It is my view that the injuries cited in the authority relied on by this Court are more comparable to the injuries suffered by the Appellant. Having had due regard to the aforesaid case and the inflationary trends as well as the fact that the doctor's medical report who examined the Appellant, recommended long term follow up and counselling and it was not specific how long the same may go on, I am of the view that a sum of award of Kshs 1, 000,000/= general damages was appropriate.
34. Taking my cue from the above and keeping in mind the various cited authorities and the arguments put forth by counsels, I am in agreement with counsel for the Respondent that the award of quantum by the trial magistrate was appropriate and commensurate with the injuries suffered by the Appellant. I find that the learned trial magistrate did not consider irrelevant factors while coming up with the award on general damages.
35. Accordingly, I am persuaded that this is not a suitable case for exercise of discretion to interfere with the trial Court's finding on general damages for the reason that the quantum that was awarded was appropriate. The appeal herein against quantum of damages is dismissed. The Appellant shall have costs of the suit in the lower Court and interest on the assessed damages from date of judgment in the lower Court. Each party to bear their own costs of this appeal.

It is so ordered.

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

D.K. KEMEI

JUDGE

In the presence of:

Wamalwa R for Appellant

Kweyu for Karanja for Respondent

Kizito -Court Assistant

