



**Kamiti v Kwikspares and General Supplies Ltd (Civil Appeal
64 of 2019) [2023] KEHC 21347 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 21347 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
CIVIL APPEAL 64 OF 2019
GL NZIOKA, J
JUNE 14, 2023**

BETWEEN

PAUL NJUGUNA KAMITI APPELLANT

AND

KWIKSPARES AND GENERAL SUPPLIES LTD RESPONDENT

*(Being an appeal against the judgment delivered by Hon. J. Karanja (PM) dated 16th
October 2019 at the Chief Magistrate's Court at Naivasha vide Civil Case No. 1068 of 2016)*

JUDGMENT

1. The background facts of the matter are that, on 1st December 2015, the plaintiff (herein the “appellant”) was a lawful pillion passenger on a Motor Cycle Registration No. KMCW 392C along the Naivasha - Kinango road at Kinamba area. That, at about 3:30 pm the motor cycle was involved in a road traffic accident with Motor Vehicle Registration No, KAQ 551M owned by the respondent.
2. That as a result he suffered bodily injuries, where he sustained a fracture of the right femur, severe soft tissue injuries of the right thigh, and permanent disability of 30%. Subsequently he sued the respondent vide Chief Magistrate civil suit No. 1068 of 2016, at Naivasha, seeking for;
 - a. Special damages and future medical expenses of Kshs 100,000 as at 13th December 2016;
 - b. General damages for pain, suffering and loss of amenities and diminished earning capacity.
 - c. Costs of the suit and interest on (a), and (b) above at court rates.
 - d. Any other or further relief that this Honourable court may deem just to grant.
3. However, the respondent filed a statement of defence where it denied the averments in the plaint and/or contributory negligence on its part as alleged and sought that the suit be dismissed.



4. At the trial, the appellant relied on his witness statement wherein he reiterated the averments in the plaint and averred that the respondent's motor vehicle hit motor cycle on which he was on from the rear. That, he blames the respondent for the accident as he drove on the wrong side of the road, at a speed, failed to break and/or be on the look-out for other road users.
5. That, as result of the injuries sustained on his right leg, he was rushed to Naivasha District Hospital where he was treated and transferred to Kenyatta National Hospital and admitted for two and a half months and a metal plate was implanted. That he feels pain when it is cold as a result of the metal plate.
6. The appellant averred that he was a farmer and would earn a sum of; Kshs 20,000 monthly. However, due to his injuries sustained and the metal plate he cannot walk for long distances and stand for long periods of time and therefore cannot work. As such he is unemployed.
7. After the close of the plaintiff's case, the defendant did not offer any evidence in his defence, consequently, the defence case was closed.
8. At the conclusion of the trial the parties filed their submissions and on 16th October 2019, trial court delivered the judgment and apportioned liability in the ratio of: 80:20 in favour of the appellant as against the defendant.
9. Subsequently, the trial court awarded the appellant; general damages in the sum of; Kshs 600,000, special damages in the sum of Kshs 110,184 and Kshs 100,000, for future medical expenses. The sum was reduced by 20% contributory liability giving rise to a total sum of Kshs 648,147.20 plus costs of the suit, and interest at court rates. However, the trial court declined to award damages for diminished earning capacity on the ground that it had not been proved.
10. It is against the subject judgment, that the appeal herein arises on the grounds in the memorandum of appeal, filed 15th November 2021 stated as follows:
 - a. That the learned Magistrate erred in fact and in law by proceeding to apportion liability against the appellant notwithstanding the fact that the respondent did not adduce any evidence to controvert the appellant's case.
 - b. That the leaned Magistrate erred in law and in fact in by proceeding to award liability against the appellant notwithstanding the fact the appellant was a pillion passenger.
 - c. That the learned Magistrate erred in law and in fact by proceeding to award minimal general damages which were not commensurate to the injuries sustained by the appellant despite the fact that the latter had never recovered to date.
 - d. That the learned Magistrate erred in law and in fact by completely disregarding the appellant's submission and authorities that had been relied on therein.
11. The appeal was disposed of by filing of submission. The appellant filed submissions dated; 28th January 2022, wherein he submitted that the respondent did not place any evidence before the trial court to rebut the appellant's evidence nor to warrant the trial court to hold the appellant negligent in any way.
12. The appellant relied on the case of; *Regina Wangechi v Eldoret Express Co. Ltd* (2008) eKLR where the court quoted the case of; *Embu Public Road Services Ltd v Riimi* (1968) EALR 22 and held that the doctrine of *res ipsa loquitar*, requires the plaintiff to prove the accident occurred in circumstances in which it should not have, to discharge the burden of showing negligence on the person who caused the accident.



13. That, the respondent did not call any witnesses despite filing a statement of defence wherein it pleaded that the appellant substantially contributed to the negligence resulting in the accident. That it is trite that, pleadings and submissions are not a substitute for evidence and remain mere allegations not substantiated. Reliance was placed on the case of; *Motex Knitwear Limited V Gopitex Knitwear Mills Limited* (2009) eKLR where Lessit J (as she then was) agreed with the proposition of the court in; *Autar Singh Babra and Another v. Raju Govindji*, HCCC No. 548 of 1998 (unreported) that the failure of the defendant to call any witnesses meant the evidence by the plaintiff was unchallenged and the defendant's defence was unsubstantiated.
14. Further, the appellant submitted that there exists a silent contract between a lawful passenger and the driver of a public service vehicle or the owner of a private motor vehicle that the lawful passenger expects to be safely delivered to his destination. He cited the case of; *Viviane Anyango Onyango & Another v Charity Wanjiku* (2017) eKLR where the court stated that, a passenger cannot be held liable or even contribute to an accident, unless it is demonstrated that he contributed to the occurrence of the accident.
15. On general damages, the appellant submitted that he had relied on the case of Civil Appeal 522 of 2012; *Clement Gitau v G.K.K* where the plaintiff suffered similar injuries and the court reduced an award of Kshs 800,000 to Kshs 600,000. That, in the present case considering inflation the award by the trial court was on the lower side.
16. Furthermore, the appellant argued on the head of diminishing earning capacity that, he was a farmer but can no longer till the land as a result of his injuries. That he used to earn an average Kshs 20,000 but he shall be incapacitated for about five (5) years and urged the court awards him Kshs 1,200,000 broken down as (Kshs 20,000 x 12 x 5).
17. He further relied on the case of; *Mumias Sugar Company Limited v Francis Wanalo* (2007) eKLR where the Court of Appeal quoted the case of; *Fairley v John Thompson Ltd* [1973] 2 Lloyd's Rep. 40 at page 41 where Denning J stated that, compensation for diminution in earning capacity is awarded as part of general damages.
18. That in the same matter the Court of Appeal stated that an award for loss of earning capacity can be made both when the plaintiff is employed or is not and that the justification for the award where the plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him to either lose his job in future or if 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 him for the risk that he will not get employment or suitable employment in future.
19. It is noteworthy that the respondent did not file any submissions in the appeal despite being afforded numerous opportunities to do so, and therefore the appeal is basically unopposed.
20. Having considered the appeal in the light of the materials placed before the court I find that, there are two main issues for determination namely; whether the trial court erred by attributing 20% contributory liability on the appellant, and by declining to award the appellant any money for diminished earning.
21. As regards the 1st issue I find that, the trial court relied on evidence by the appellant that they were hit from behind by a motor vehicle that was trying to overtake. That the respondent did not tender any evidence to rebut the same. He deserved the benefit of doubt. I therefore find the decision holding the plaintiff 20% liable untenable and is not justified, in view of the fact that, the defendant did not



testify and/or attributed negligence on the part of the appellant and/or the rider. I therefore set aside the order of apportionment of liability at 80:20 in favour of the appellant, as against the defendant.

22. As regards the failure by the court to award damages for loss of future earning or diminished earning. The authorities cited by the appellant establish that: -
- a. Compensation for future earning are awardable for real assessable loss proved by evidence.
 - b. Compensation for diminutions in earning capacity in awarded as part of general damages.
 - c. If the claimant is not employed, there should be evidence that he has lost his job or cannot get another alternative job.
23. In the instant matter the medical report by Dr. Obed Omuyoma's indicates that, the appellant has a surgical scar on his right thigh, a fracture mid shaft on the right femur and permanent disability of twenty percent (30%). The question is how did the doctor arrive at 30% permanent disability? In fact, he clearly indicates that the K-nail will be removed at a cost of; Kshs 100,000. He does not allude to any other complication after it is removed.
24. In addition, from the evidence relied on by the appellant in chief, he simply said "I have not healed. I have a metal plate in my leg. I don't have money to have it removed. I cannot step down with the leg so I cannot do any work". Thus his solution lies in the removal of K-nail, which an award has made provision for.
25. It suffices to note that although the appellant states that he was working as a farmer, no evidence was produced to support the same or even the earning. Neither does the doctor's report allude to inability to perform the subject work after the K-nail is removed. In that regard I find that, the claim for diminished earning is not sustainable. I concur with the finding of the learned trial magistrate on the same.
26. Finally, on the issue of damages awarded the law is settled that, the 1st appellate court will not interfere with the trial court's discretion in assessing damages unless in exercising that discretion the court misdirected itself in some matters and arrived at an erroneous decision, or was clearly wrong in the exercise of that judicial discretion which resulted into injustice as held in the cases of; *Mbogo & another v Shab* (1968) EA and *Mkuba v Nyamuro* 1983 KLR 403.
27. In the same vein the Court of Appeal in *Loice Wanjiku Kagunda v. Julius Gachau Mwangi* CA 142/2003 (unreported) stated that: -
- "We appreciate that the assessment of damages is more like an exercise of judicial discretion and hence an appellate court should not interfere with an award of damages unless it is satisfied that the judge acted on wrong principles of law or has misapprehended the facts or has for those other reasons made a wholly erroneous estimate of the damages suffered. The question is not what the appellate court would award but whether the lower court acted on the wrong principles (see *Manga v Musila* [1984] KLR 257)."
28. The appellant's two main issues outlined above having been dealt with, the upshot of the appeal is that, the appeal succeeds in the following terms.
- a. General damages -----Kshs 600,000
 - b. Special damages----- Kshs 110,184
 - c. Future medical expenses -----Kshs 100,000



Total amount awarded----- Kshs 810,184

29. The appellant is awarded costs of the suit in the trial court and total sum awarded shall attract interest at court rates from date of judgment in the trial court until payment in full.

30. It is so ordered.

DATED, DELIVERED, SIGNED ON THIS 14TH DAY OF JUNE, 2023

GRACE L. NZIOKA

JUDGE

In the presence of

Ms Amboko for the Appellant

N/A for the Respondent

Ms Ogutu-Court Assistant

