



REPUBLIC OF KENYA



**Guandaru & 2 others v Gitau (Civil Appeal 83 of 2021)
[2023] KEHC 19849 (KLR) (6 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 19849 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 83 OF 2021
HK CHEMITEI, J
JULY 6, 2023**

BETWEEN

JAMES MUREITHI GUANDARU & 2 OTHERS APPELLANT

AND

JOSPHAT MUIGAI GITAU RESPONDENT

*(Being an Appeal from the Judgement of Hon. Rose Ombata
(SRM) dated 27th July 2021 in Nakuru CMCC No. 870 of 2019)*

JUDGMENT

1. On 18th June 2019 within Nakuru Industrial area at or near Karafu area the respondent who was a pedestrian was knocked by a wall pursuant to the same being hit by the appellant's driver and or agent and as a consequence he sustained the following injuries.
 - (a) Below knee amputation of the right lower limb due to crash of the limb
 - (b) Soft tissue injury of the chest
 - (c) Soft tissue injuries of the back
2. The respondent thereafter filed a claim for both general and special damages against the appellants. In its judgement dated 27th July 2019 the court found the appellants 100% liable and proceeded to award the respondent general damages of Kshs. 1,500,000, loss of earnings Kshs. 313,067, damages for diminished earnings in the future at Kshs1,577,860, cost of future medical expenses of Kshs90,8571 and special damages of Kshs 62,540, totalling Kshs.
3. It is against this backdrop that the appellants being dissatisfied with the said judgement have appealed against the same citing several grounds touching the said general damages.
4. The court directed the parties to file written submissions which they have complied.



Appellants submissions

5. The appellants raised or condensed their grounds into 4, namely, whether the award was excessive in the circumstances, whether loss of earning award was merited, whether the award on future treatment was proved and whether negligence was established against the appellants despite the fact that they offered no evidence.
6. On the first ground the appellants submitted that the award on general damages was excessive in the circumstances and was not in consonant with the authorities cited and prevailing which were almost in tandem with the injuries suffered by the respondent. It was the appellants opinion that an award of Kshs800,000 would have been sufficient under this heading. They cited several authorities to back up their case.
7. On the issue of loss of earning they submitted that the same was erroneous as the respondent did not tender any prove. He did not prove that he used to earn Kshs1000 per day as a lorry driver. This was against the provisions of Section 107 and 108 of the Evidence Act which demands that he who alleges must always prove.
8. The appellants without prejudice contented that the court ought to have awarded the respondent such damages under unskilled labour pursuant to the Regulation of Wages (Agriculture Industry Amendments) Order 2018 as an unskilled employee. The minimum wage would therefore have been Ksh3600
9. The appellants also took issue with the multiplier of 30 year applied by the trial court. They proposed that the court would have used a multiplicand of 15 years considering the vicissitudes of life as was held in *Hannah Wangaturi Moche & Another v. Nelson Muya*, Nairobi HCC No. 4533 of 1993.
10. As regards the issue of future medication it was the perspective of the appellants that the same was not pleaded and proved. According to the appellants the most the court would have done is to take a middle ground and not the highest figure of Kshs212,000.
11. On liability the appellants submitted that despite them offering no evidence on defence the respondent did not prove how the accident occurred. In other words, the respondent failed to discharge this burden.
12. The appellants therefore prayed for the appeal to be allowed and the costs be awarded to them.

Respondent's Submissions

13. The respondent on his part submitted on the same issues arguing that the trials court decision ought not to be interfered with as it was based on sound legal grounds.
14. He submitted that the award of Kshs1,500,000 on general damages was in line with the evidence tendered as well as it was backed up by the cited authorities and therefore it ought not to be disturbed considering the permanent injuries sustained by the respondent.
15. On loss of earnings he contended that the trial court was right for it considered the fact that one need not have a payslip to prove that he earned a monthly income. In other words, one will still be entitled under the heading despite not producing any documentary evidence.
16. This also went with the issue of the multiplicand used by the trial court. He submitted that the 30 years used was commensurate with the expected age of retirement if he was in a formal employment. In any



case being in a non-formal employment he would work beyond the 60 years. He said that the 15 years' period proposed by the appellants was not feasible considering the authorities he relied on.

17. On the costs of future medication, it was his submissions that the trial court agreed with Dr. Malik and not Dr. Kiamba for the simple reason of seniority and thus the sum of Kshs212000 as opposed to 200000 estimated by Dr. Kiamba who was a general practitioner.
18. On liability the respondent submitted that he proved his case on a balance of probability and in any case there was no evidence to the contrary. The respondent therefore prayed that the appeal be dismissed with costs.

Analysis and determination

19. The court is supposed to re-evaluate the evidence afresh and come up with an independent finding. It is now accepted that at this appeal stage the court will only interfere with the findings of the trial court if the said court arrived at an award which was excessive in the circumstances, or considered an erroneous view of the evidence so tendered and or acted on a wrong principle.
20. The occurrence of the accident and how it did was not in dispute. The respondent in my view discharged this duty and there was no rebuttal from the appellants who closed their case without calling any evidence. On liability therefore this court respectfully does not agree with the appellant's submissions. The trial court analysis on the same was spot on.
21. On the issues of the injuries sustained by the respondent the same is not in dispute and I think other than the other soft tissue injuries he sustained the main injury was the amputation of his leg. The rest of the injuries had healed well at the time of testifying.
22. Was the award then of Kshs1,500,000 general damages excessive in the circumstances.? I have looked at the evidence and the authorities relied on by the parties as well as the trial court. Definitely each quoted the highest and the lowest awards respectively. This is usually expected in such injury claims.
23. I find that the award was not excessive taking into consideration the parallel authorities relied on by the trial court. In *John Kipkemboi & Another v. Morris Kedolo (2019) eKLR* I note that he was awarded Kshs2.5 million having sustained similar injuries.
24. I think the authorities cited by the appellant slightly felt short of the threshold and the period was slightly old. I find that under this sub heading the trial court was reasonable in awarding the said sum considering that the cited authorities were above Kshs 2 million by the respondent and below or about Kshs 1 million by the appellant. The sum awarded was more less a middle ground and I shall not disturb.
25. On the issue of loss of earnings I agree with the parties that it is now trite law that one need not have any documentary proof of earnings. Most "hustlers" have nothing to show as they live on daily casual jobs to make their ends meet.
26. In this case the respondent claimed that he was a truck driver and he exhibited his driving licence. Other than that he did not produce anything else. I find that the line taken by the appellant that the court ought to have treated him as unskilled labourer was appropriate.
27. In the premises and in agreeing with the appellant the proper sum to be awarded to the appellant should have been based on the *Regulation of Wages (Agriculture Industry Amendment) Order 2018*. At the time of the judgement the same stood at Kshs 3597 which could be rounded off to Kshs 3600.



28. On the issue of the multiplier I do not agree with the appellants that the period of 30 years taken by the court was not appropriate. The retirement age still stands at 60 years. In the private sector or *jua kali* which I think the respondent falls under there is no certain retirement age. Sometimes one is forced to hustle beyond 60 years barring all the vicissitudes of life.
29. To suggest therefore that the multiplier of 15 years to be applied is way too low in the circumstances. However, because of the fact that the payments would be in a lump sum I think the proper multiplier ought to be 20 instead of 30 or 15 suggested by the court and the appellant.
30. On the costs of medication I find that the trial court was right in taking the proposal by Dr. Malik by virtue of his status. In any case the said artificial limb will be subjected to the usual inflation and by the time the respondent goes for the next one, naturally it is expected that the costs would have gone up. The difference of about Kshs. 12,000 in my view will mitigate against the inflationary trends of the Kenya shilling.
31. Finally, on costs of this appeal I find that each party ought to meet its respective costs.
32. The appeal partially succeeds. Under the heading of loss of income, the same ought to be calculated, thus $Kshs\ 3600 \times 25\ months = Kshs\ 90,000$.
33. Under loss of future earnings, thus, $3600 \times 12 \times 15 = Kshs\ 648,000$
34. The other headings remained the same.

Conclusion

35. In the premises the total amount due to the respondent is as hereunder;
 - (a) General damages Kshs1,500,000.
 - (b) Damages for loss of income/earnings Kshs 90,000
 - (c) Damages for diminished/loss of future earnings Kshs 648,000
 - (d) Damages for future medication Kshs 908,571
 - (e) Special damages Kshs. 62,540
 - (f) Total Kshs. 3,209,111
 - (g) The same shall attract interest at courts rates from the date of the lower courts judgement till payment in full.
 - (h) Each party to bear own costs in this appeal

DATED SIGNED AND DELIVERED VIA VIDEO LINK THIS 6TH DAY OF JULY 2023.

H. K. CHEMITEI

JUDGE

