



**Mjengo Limited v Mongare (Civil Appeal E077 of 2021)  
[2023] KEHC 21420 (KLR) (20 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21420 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MIGORI  
CIVIL APPEAL E077 OF 2021  
RPV WENDOH, J  
JULY 20, 2023**

**BETWEEN**

**MJENGO LIMITED ..... APPELLANT**

**AND**

**NORAH MONGARE ..... RESPONDENT**

*(An Appeal from the Judgement and Decree of Hon. Peter Areri Principal Magistrate (PM) dated and delivered on 27/7/2021 in Migori CMCC No. 203 OF 2019)*

**JUDGMENT**

1. Mjengo Limited (the appellant) filed this appeal against the judgement and decree of Hon. P. Areri (PM) dated and delivered on 27/7/2021. The appellant is represented by the firm of Murimi, Ndumia, Mbago and Muchela Advocates. The respondent, Norah Mongare is represented by the firm of Ben K. Gichana & Co. Advocates. For purposes of the judgement in this appeal and cross appeal, Mjengo Limited will be the appellant while Norah Mongare will be the respondent.
2. By a plaint dated 4/12/2019, the respondent commenced a suit against the appellant claiming general damages for pain and suffering, future medical expenses, costs of the suit and interest. The respondent pleaded that on or about 15/7/2019, she was lawfully walking off the road along the Kisii - Migori road when at Kawendo area, the appellant's driver/agent so negligently drove, managed and/or controlled motor vehicle registration number KBK 442Q that he permitted the same to lose control, veer off the road and hit the respondent. As a result, the respondent she sustained severe bodily injuries. The respondent pleaded that the appellant should be held vicariously liable for the tortuous acts committed on her by the appellant's driver or agent.
3. The respondent pleaded the particulars of negligence on the part of the appellant, its driver, servant, employee, or agent. The respondent further pleaded the particulars of the injuries and special damages. The respondent stated that prior to the accident, she was in perfect health and was in business earning



- an average of Kshs. 20,000/= per month; that the accident caused her incapacitation for which she now claims loss of earning capacity. It was further stated that the respondent would need future medical expenses for the incapacity caused by the amputation of the toe.
4. The appellant entered appearance and filed a statement of defence dated 3/2/2020. The appellant denied the occurrence of the accident and also particularized the negligence of the respondent.
  5. The suit proceeded for hearing. The respondent testified as PW1. The appellant did not present any witnesses to testify on its behalf.
  6. The trial court entered judgement in favour of the respondent in the sum of Kshs. 679, 656/=. Being dissatisfied with the judgement and decree, the appellant commenced this appeal via a memorandum of appeal dated 11/8/2021 on the following grounds: -
    - a. That the trial Magistrate erred and misdirected himself in fact and law by awarding general damages to the respondent that were manifestly excessive in the circumstances and thus failed to appreciate the principles applicable in the award of damages;
    - b. That the trial court erred in law and in fact in assessing damages and failed to apply the principles applicable in award of damages of comparable awards made for analogous injuries;
    - c. That the trial court erred in law and in fact in misapprehending and misapplying the inflation rate and awarded general damages that were manifestly excessive;
    - d. That the trial court erred in law and in fact in awarding Kshs. 200,000/= as future medical expenses which amount was not specifically pleaded and was only introduced in the respondent's submissions;
    - e. That the trial court erred in law and in fact in failing to appreciate that submissions are not avenues to tender evidence and thus awarded costs for future medical expenses based on the respondent's submissions.
  7. Consequently, the appellant sought the following orders:-
    - i. That the judgement and/or decree of the court delivered on 27/7/2021 be reviewed and/or set aside.
    - ii. That the court be pleased to make an appropriate award in tandem with pleadings, evidence, law and decided authorities.
    - iii. That the costs of the appeal be borne by the Respondent.
  8. The respondent filed a memorandum of cross-appeal dated 17/08/2021 citing the following grounds: -
    - i. That the trial Magistrate erred in law and fact by awarding the appellant a sum of Kshs. 600,000/= as general damages for pain and suffering which award was so inordinately low as to amount to an erroneous estimate of loss and damage by the Appellants.
    - ii. That the trial Magistrate erred in law and fact by disregarding decisions of superior courts in similar issues of consideration, cited by the appellant in her written submissions and thus breaching the doctrine of stare decisis.
    - iii. That the trial Magistrate's decision on quantum albeit a discretionary one was plainly wrong.
  9. The respondent pleaded: -
    - i. The cross-appeal be allowed.



- ii. The judgment and/or decree of the lower court on quantum be set aside and/or reviewed and this court do enter judgment in favour of the appellant as per her submissions in the lower court.
  - iii. The appellant be awarded costs both in this cross-appeal and in the lower court.
10. The appeal was canvassed by way of written submissions. Both parties complied and filed their respective submissions.
11. The appellant filed its submissions dated 20/1/2023 on 11/3/2023. On whether the trial court made an excessive award of Kshs. 600,000/= as general damages, it was submitted that the trial court relied on authorities where the injuries were not comparable to those suffered by the respondent. The appellant urged the trial court to rely on the case of John Kipkemboi & Another vs Bramwel Vuniku (2020) eKLR where the court considered an amputation of a toe and awarded general damages of Kshs. 200,000/=.
12. On whether the trial court misapprehended and misapplied the inflation rate, it was submitted that the trial court erred in relying on the case of Gerald Oyugi vs Evans Okeyo Mochere (2019) eKLR in which an award of Kshs. 800,000/= was made in 2019 by the trial magistrate on the basis of inflation rates. It was submitted that the inflation rate could not have doubled between 2019 and 2020 when the impugned judgement was delivered.
13. On the cost of future medical expenses, it was submitted that the same was based on wrong principles of the law; that future medical expenses ought to be pleaded and proved as special damages as was held by the Court of Appeal in Simon Taveta vs Mercy Mutitu Njeri Civil Appeal No. 26 of 2013. The appellant submitted that the sum of Kshs. 200,000/= was raised in the respondent's submissions and therefore the award on future medical expenses was neither pleaded nor was there medical evidence produced to warrant that award.
14. The respondent filed her submissions dated 23/4/2023 on 9/5/2023. The respondent submitted that the trial court considered the inflationary trends in awarding the general damages, but it did not consider the extent of the injuries suffered in awarding the general damages. The respondent asked this court to allow her cross appeal on this ground and revise the award on general damages to Kshs. 1,000,000/=.
15. On the failure to award loss of earnings, the respondent submitted that she pleaded loss of earning capacity. It was submitted that loss of earning capacity may and should be included as an item within general damages. It was submitted that the respondent was an adult and therefore it would not be reasonable to conclude that she was not earning a salary. It was further submitted that this court should use the multiplier - multiplicand approach in assessing the damages.
16. Further, the respondent submitted that since there are no documents to prove the income, the court should be guided by the provisions of the Regulation of Wages (Amendment) Order 2016 and use Kshs. 7, 240.95 as the basic minimum wage. In light of the foregoing, the respondent urged the court to award Kshs. 521, 348.40/= as the loss of earning capacity.
17. On the award of future medical expenses. It was submitted that the court took into account the inflationary trends and awarded a sum of Kshs. 200,000/=. The respondent urged this court to dismiss the appellant's appeal and allow its cross appeal as prayed.
18. This being the first appeal, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the



witnesses testify. It has to establish whether the decision of the lower court was well founded. See the decision in *Selle & Another vs Associated Motorboat Co. Ltd* (1968) EA 123.

19. It is also settled that an appellate court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or on demonstrably wrong principles not supported by evidence or on wrong principles of the law. This was the finding of the Court of Appeal in *Mbugua Kiruga v Mugecha Kiruga & another* [1988] eKLR where the Court of Appeal held: -

“An appeal court cannot properly substitute its own factual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand but this is a jurisdiction which should be exercised with caution.”

20. Guided by the above decisions, I have read, understood and considered the grounds of appeal, the cross appeal, the record of appeal and the submissions of the appellant. The issues which arise therefrom are: -

- a. Whether the trial court assessed the general damages correctly.
- b. Whether the trial court awarded the future medical expenses based on the correct principles.
- c. Whether the trial court erred in failing to award damages for loss of future earning capacity.

21. There is no contention on the issue of liability. The parties filed a consent on liability on 20/5/2021 in the ratio of 80:20 in favour of the respondent against the appellant.

22. On the assessment of general damages by an appellate court, the Court of Appeal in *Ephantus Mwangi and Another vs Duncan Mwangi Wambugu* (1984) eKLR held: -

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the findings he did”

23. Further, this court is guided by the principles enunciated by the Court of Appeal in the case of *Kemfro Africa Limited t/a as Meru Express Service, Gathogo Kanini vs A.M Lubia and Olive Lubia* (1985) eKLR.

“The principles to be observed by this appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge are that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.”

24. In *Simon Taveta v Mercy Mutitu Njeru* (2014) eKLR it was held that: –

“The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past.”

25. According to the plaint, the injury suffered by the respondent was crush wound on the left foot (Gustillo 3A) with traumatic amputation of 3 toes from the medial aspect. Dr. Morebu Peter in his 2<sup>nd</sup> medical report dated 26/9/2019 opined that the injury suffered by the respondent was crushed wounds



on the left foot with traumatic amputation of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> toes. The medical report stated that the respondent suffered grievous harm and permanent disability was assessed at 40%. Dr. M.S. Malik in his 2<sup>nd</sup> medical report dated 2/1/2020 opined that there was a partial amputation of the big toe which left an open wound. Dr. Malik stated that there were no other fractures and all the bones of the four remaining toes are intact. He assessed the respondent's permanent incapacity at 5%.

26. Notwithstanding the variance in the nature of the injuries in the medical reports, the undisputed fact in the two reports is that the respondent suffered an amputation of the big toe. The respondent testified: -
- “I sustained injury on the leg and amputated one toe.”
27. In reaching his finding, the trial court relied on the case of Gerald Oyugi vs Evans Okeyo Mochache Kisii Civil Appeal No. 102 of 2018. In that case, the respondent sustained contusion of the right foot, amputation of the right big toe, deep cut wound on the 2<sup>nd</sup> toe, multiple bruises on the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> toes and a fracture of the foot bone. The appellate court set aside an award of Kshs. 800,000/= as general damages and substituted it with Kshs. 300,000/= in the year 2018.
28. The appellant urged this court to be persuaded by the findings in John Kipkemboi & Another vs Bramwel Vikinu (2020) eKLR. In that case, the respondent suffered amputation of the left big toe and the appellate court reduced the award to Kshs. 200,000/=. The respondent submitted that since the permanent disability was assessed at 40%, the general damages ought to be enhanced to Kshs. 1,000,000/=. Reliance was placed on the case of Agnes Wanjiku Ndegwa vs Kenya Power & Lighting Ltd (2014) eKLR where the permanent disability was assessed to be between 30 and 35% and the respondent was awarded Kshs. 1,300,000/= in 2014.
29. In the case of Peter Kioko & another v Hellen Muthee Muema (2018) eKLR the respondent's left big toe was amputated. The appellate court reduced the general damages from Kshs. 300,000/= to Kshs. 200,000/= in 2018.
30. Ideally, comparable injuries ought to attract comparable damages. Having considered the authorities relied upon by each party, I find that in the Gerald Oyugi case (supra) the injuries suffered were more severe compared to those suffered by the respondent herein. The cases of John Kipkemboi (supra) and Peter Kioko (supra) are relevant, and the injuries therein are comparable to those suffered by the respondent herein.
31. On disability, considering the nature of the injury, the assessment of 40% in my view was on the higher side and exaggerated. This court is inclined to agree with the findings of Dr. S. Malik that permanent disability will be at a reasonable percentage of 8% or thereabout. The degree of the disability is not reason enough to warrant the enhancement of the award to Kshs. 1,000,000/= as submitted by the respondent.
32. From the comparable decisions, this court finds there is good reason to interfere with the award of Kshs. 600,000/= as general damages and sets it aside and substitutes it with an award of Kshs. 350,000/= as general damages for pain and suffering.
33. On the award of future medical expenses, the principle is well settled that it should be specifically pleaded. Tracom Limited & Another -vs- Hassan Mohamed Adan (2009) eKLR stated: -

“...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



34. The medical report by Dr. Malik opined that the left big toe has an open wound which would require skin grafting and the operation would cost her about Kshs. 80,000/=. The report by Dr. Morebu is silent on any future medical treatment which would be needed by the respondent. The respondent pleaded an award for future medical expenses. I therefore find that an award of Kshs. 100,000/= as future medical expenses is reasonable. The award of Kshs. 200,000/= is hereby set aside.
35. On the loss of future earnings, the principles for on the award of such damages were espoused in *Mumias Sugar Company Limited Vs. Francis Wanalo* (2007) eKLR stated as follows: -
- “...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 to either losing his job in the future or in case he loses the job, his diminution of chances of getting an alternative job in the labor 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 the 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 approximate financial loss that the plaintiff has suffered as a result of disability.”
36. The respondent’s argument in trying to justify an award of loss of earning capacity was the amputation of her big toe. In making the decision on whether or not to award damages on the loss of earning capacity, the court has to consider the approximate financial loss that the claimant has suffered as a result of disability. In my view, the respondent has not been able to discharge this burden. There is no evidence which was led to show that the respondent is likely to become immobile as a result of the amputation, diminishing her chances of earning a living.
37. As it has been observed hereinbefore, the degree of incapacitation is 8%. I do not see how that is grievous. In addition, the amputation was of the toe. I do not see how the injuries were grievous to the extent of making the respondent not be able to fend for herself. I therefore find that this prayer is not merited and it is hereby dismissed.
38. In the end, I find that the appeal is merited but the cross appeal is devoid of merit. The judgement and decree of the Hon. Areri dated and delivered on 27/7/2021 is hereby set aside in the following terms:-
- Liability - 80% : 20% in favour of the respondent.
- General damages - Kshs. 350,000/=
- Future medical expenses - Kshs. 100,000/=
- Special damages - Kshs. 49, 570/=
- Sub total - Kshs. 499,570/=
- Less Liability agreed - Kshs. 39, 651/=
- Total - Kshs. 459,919/=
39. The appellant is awarded half the costs of this appeal. Interest will start running from the date of the trial court’s judgement.



DATED, DELIVERED AND SIGNED AT MIGORI THIS 20<sup>TH</sup> DAY OF JULY 2023

R. WENDOH

JUDGE

**Judgment delivered in the presence of;**

No appearance for the Appellant.

Mr. Aremo for the Respondent.

**Emma** Court Assistant.

