



Mbaji v Joseph Kithuku Kitonga t/a Muki Hardware & another (Civil Appeal 055 of 2022) [2023] KEHC 21080 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 055 OF 2022
DKN MAGARE, J
JULY 6, 2023**

BETWEEN

MBOGO MBAJI APPELLANT

AND

JOSEPH KITHUKU KITONGA T/A MUKI HARDWARE 1ST RESPONDENT

KIDHONGO KALINWA MDAKE 2ND RESPONDENT

JUDGMENT

1. This is an appeal from the Judgment of Hon. Christine Arika given on 30/3/2022 in Kwale CMCC 332 of 2018. In the Ruling, the Appellant who was the Plaintiff, was the successful party - or so we thought.
2. The Appellant filed a 4-ground Memorandum of Appeal in strict compliance with Order 42 Rule 1. The grounds are as follows:-
 - a. That the Learned Trial Magistrate erred in law and fact by delivering judgment on quantum in total disregard of the Appellant's submission and authorities.
 - b. That the Learned Trial Magistrate erred in law and fact in awarding the Appellant Kshs. 230,000.00 as general damages for pain and suffering - which is an award so inordinately low in the circumstances and in view of the injuries the Appellant sustained.
 - c. That the Learned Trial Magistrate erred in law and fact by holding that the appellant did not prove the lost earnings of six (6) months pleaded.
 - d. That the Learned Trial Magistrate erred in law and fact by failing to award the Appellant the pleaded and proved lost earnings of the six (6) months period he was unable to work after the accident.



3. The Appellant suffered the following injuries: -
 - a. Fracture of the 1st metacarpal regent on the right hand.
 - b. Large bruise on the right shoulder.
 - c. Laceration on the left parietal scalp and on the chin.
4. The Appellant was treated as an outpatient and discharged. Dr. S.K. Ndegwa examined the appellant on 22/1/2018. He stated the injuries as pleaded. The Appellant was treated as an outpatient at Msambweni County Referral Hospital. He conceded that the injuries were borne and soft tissue injuries. There is no permanent disability.
5. The plaintiff stated in his plaint that he was unable to work for 6 months and thus lost income of Kshs. 1,800/= per day.
6. The Dr. noted that a few sessions of physiotherapy would address the stiffness of the joints of the right thumb.

Duty of the first Appellate court

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.
8. This court is not supposed to interfere with the discretion of the Court. In the case of *Mbogo and Another vs. Shah* [1968] EA 93, the court stated:

“...that this Court will not interfere with the exercise of judicial 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 on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”
9. The duty of the 1st Appellant Court was settled long ago by Clement De Lestang, VP, Duffus and Law JJA, in the *locus Classicus* case of *Selle and another Vs Associated Motor Board Company and Others* [1968] EA 123, where the law in its usual gusto held as follows:-

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”
10. In the case of *Peters vs Sunday Post Limited* [1985] EA 424, the court of Appeal held as follows:-

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”



Analysis

11. There is no appeal on liability. The memorandum of appeal raises only 2 issues, in the 3 grounds of Appeal, that is: -
 - a. Whether quantum awarded were too low as to amount to an erroneous estimate of damages.
 - b. Whether the Appellant is entitled to lost earnings and for how long?
12. I shall analysis each of them separately.

Lost earnings

13. I will address the issue of lost earnings first and then contrast it with the loss of earning capacity. The issue of lost earnings by its nature is a special claim. It must specifically be pleaded and proved. This was through the evidence of employment and employer's evidence for absence. The lost earnings were not shown to have ben merited.
14. The Appellant had the accident while being a passenger on a motor bike. He however pleaded that he was riding motor cycle Registration No. KMCE 314K. He did not prove he was a *matatu* driver or that he was earning the said amount of Kshs. 1800/=. The court meets him on a motor bike - not a *matatu*.
15. His statement showed that he was a motor cycle rider for motor cycle registration No. KMCE 314K, headed towards Ukunda at the material time.
16. The PSV Driver license produced expired on 29/5/2018. He was not shown to be working thereafter. There was no proof of temporary incapacity of any kind. The failure to work is not injury related. There is no proof that he was given 6 months or any period off duty. He had already been discharged as he was outpatient. Only a few sessions were needed to straighten his thumb.
17. On the other hand, loss of earning capacity forgoes with the postulation from the permanent disability. The plaintiff did not suffer any permanent disability and as such he correctly did not claim this under diminished earning capacity.
18. I do not doubt for a minute that he may not have worked for 6 months or even 2 years. Employment is hard to come by and as such not working for 6 months is not surprising. However, not working is not the test. The test is that there were earning he was having but lost them for a defined period due to incapacity. This was not proved.
19. In *Cecilia W. Mwangi and Another vs Ruth W. Mwangi* NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of “loss of earning capacity” can be classified as general damages but these have also to be proved on a balance of probability.”
20. In the case of *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR, the Court of Appeal held that:

“Loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vacuum or whimsically”



21. The Court of Appeal in *S J v Francesco Di Nello & another* [2015] eKLR stated as doth: -
- “Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved.”
22. This was the position enunciated in *Fairley v John Thomson Ltd* [1973] 2 Lloyd’s Law Reports 40, wherein Lord Denning M. R. said as follows:
- “It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.”
- Learned counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it was a claim under loss of income or future earnings.”
23. Though pleaded, the Appellant did not prove loss of earnings as a result of the accident. These are special damages that must not only be particularized but also proved. It has been said for the umpteenth time that special damages must not only be particularized but specifically proved. If we were to take the Appellant seriously on his work - who was his employer, which vehicle was he driving and how much was he earning and where is the evidence of prior earning? It is not enough to just estimate.
24. The claim for lost earnings is tenuous and the court below was correct in dismissing the same in limine. The appeal on the aspect of 6 months lost earnings is untenable in the circumstances and as such is dismissed.

General damages

25. Damages are usually at large. There can be no two cases which are the same. They differ from case to case. In this particular case, the major injury was the fracture of the first metacarpal on the right hand. This, though not pleaded, was on the right thumb. The rest were bruises and lacerations.
26. In the case of *Nyambati Nyaswabu Erick Vs Toyota Kenya Ltd & 2 Others* (2019) eKLR, Justice D S Majanja, held as doth:
- “General damages are damages at large and the Court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method approach should be that comparable injuries would as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly the same.”
27. The duty of the court regarding damages is settled, that the state of the Kenya economy and the people generally and the welfare of the insured and injury to public must be at the back of the mind of the trial court.



28. The foregoing was settled in the case of Butter Vs Butter Civil Appeal No. 43 of 1983 (1984) KLR where the Court of Appeal held as follows at paragraph 8.

“In awarding damages, a Court should consider the general picture of all prevailing circumstance and effect of the injuries of the claimant but some degree ofis to be sought in the awards, so regard would be paid to recent awards in comparable cases in local Courts. The fall of value of monies generally, the levelling up and down of the facts of exchange between currencies...should be taken into consideration.”

29. Finally, in deciding whether to disturb quantum given by the lower court, the court should be aware of its limits. Being exercise of discretion, the exercise should be done judiciously and conclusively to ensure that the award is not too high or too low as to be an erroneous estimate of damages.

30. The Court of Appeal, pronounced itself succinctly on these principles in Kemfro Africa Ltd Vs Meru Express Service Vs. A.M Lubia & Another 1957 KLR 27 as follows: -

“The principles to be observed by an appellate Court in deciding whether it is justified in distributing the quantum of damages awarded by the trial Judge were held in the Court of Appeal for the former East Africa to be that it must be satisfied that either the Judge in assessing the damages, took into account an irrelevant facts 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 damages.

31. The foregoing statement had been ably elucidated by Sir Kenneth ‘Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages: -

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

32. Therefore, for me to interfere with the award, it is not enough to show that the award is high or that had I handled the case in the subordinate court, I would have awarded a different figure.

33. So my duty as the appellate court is threefold regarding quantum of damages: -

- a. To ascertain whether the Court applied irrelevant factors or left out relevant factors.
- b. To ascertain whether the award is too high as to amount to an erroneous assessment of damages.
- c. To ascertain whether the award is simply not justified from evidence, that is, the court was plainly wrong.

34. To be able to do this, I need to consider similar injuries, take into consideration inflation or other comparable awards.

35. Sir Kenneth O’Connor P, in restating the Common Law Principles earlier enunciated in the case at the Privy Council, that is, Nance vs British Columbia Electric Co Ltd, in the decision of Henry Hilanga



vs Manyoka 1961, 705, 713 at paragraph c, where the Learned Judge ably pronounced himself as doth regarding disturbing quantum of damages:-

“The principles which apply under this head are not in doubt. Whether the assessment of damages be by the Judge or Jury, the Appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case at the first instance...”

36. For the appellate court, to interfere with the award, it is not enough to show that the award is high or had I handled the case in the subordinate court, I would have awarded a different figure.

37. In the submissions in the lower court the respondent relied on the decision of Mwavita Jonathan v Silivia Onunga [2017] eKLR. They stated that an award of 170,000 shall suffice. This was guided by the decision of Songole Elam v Paul Kivisi Lunalo [2019] eKLR where Justice W. MUSYOKA, substituted an award for Ksh.300,000/= with 250,000/= for injures recorded as doth: -

“ 14. Two medical reports were placed on record by consent. There is a medico-legal report by Dr. James Obondi Otieno, dated 29th July 2016, which reflected his injuries as bruises on the chest, blunt trauma to the knee, bruises on the right knee, blunt chest trauma and bruises on the right and left leg, 4th and 5th metacarpals left. The prognosis was that the fractures of the metacarpals had healed with no permanent disability. The report by Dr. John Ouma Odondi, dated 10th July 2017, reflects that the respondent had bruises on the right knee and leg, a painful swollen hand, soft tissue injuries on the chest and knees and fracture of the 4th and 5th phalanges. The doctor opined that the injuries had healed well”.

38. The Appellant pleaded a sum of Ksh. 300,000. He relied on the authority of Silphanus Kumba Murondo v Lamek Mbaka Motegi & another [2013] eKLR, in that justice M. J. ANYARA EMUKULE, as he was then, substituted an award of sum of Shs 60,000/= awarded by the lower court with a sum of Ksh 220,000/= on 7/11/2013 for soft tissue injuries sustained and fracture of the “5th metacarpal bone of the right hand”. The soft tissue injuries were to the chest, right thigh and blunt injury to the right hip-joint.

39. At appeal level the issue is not what appropriate award should be, but whether the award is inordinately excessive or inordinately low as to amount to an erroneous estimate of damages or otherwise the court was plainly wrong. The awards oscillate between 200,000/= to 300,000/= in matters considered by the court.

The Appellant’s submissions

40. The appellant still submits that an award of Kshs. 300,000/= should be made instead of 230,000/=. He does not appear serious on this ground. I agree that the award of 230,000/= instead of 230,000 may be low. However, as correctly submitted by the Appellant, it is not my duty to substitute the lower court’s assessment with mine.

41. The difference was that the awards were made in 2013. Further, the decisions did not take into consideration residual effects. The difference between the two figures is small. However, the court did not take into consideration the stiffness of the thumb that persisted afterwards. That was a misdirection.



42. Taking into consideration the inflation, lapse of time and the residual stiffness, I find that a sum of Ksh 230,000/= is inordinately low. I substitute the award of Kshs. 230,000/= with Ksh. 280,000/=. The appellants shall have costs of Ksh. 35,000/=.

Determination

43. The upshot of the foregoing, is that I make the following orders: -

- i. I set aside the award of general damages given in the lower court and in lieu thereof award a sum of Ksh 280,000/=
- ii. The claim for lost earnings is untenable and is as such dismissed in limine. The appellants to have costs of Kshs. 35,000/= for the appeal.
- iii. Special damages remain as ordered by the court below.
- iv. The appellants to have costs of the lower court.
- v. File is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 6TH DAY OF JULY, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Lewa for the Appellant

No appearance for the Respondent

Court Assistant - Brian

