



**Commercial Bank of Africa Limited v Wairimu (Civil Appeal E188 of 2020)  
[2023] KEHC 23672 (KLR) (Civ) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEHC 23672 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL APPEAL E188 OF 2020**

**AN ONGERI, J**

**OCTOBER 19, 2023**

**BETWEEN**

**COMMERCIAL BANK OF AFRICA LIMITED ..... APPELLANT**

**AND**

**LOISE WAIRIMU ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D. O. Mbeja  
(SRM) in Milimani CMCC No. 4203 of 2019 delivered on 14/8/2020)*

**JUDGMENT**

1. The respondent in this appeal *Loise Wairimu Kiongera* sued the appellant, Commercial Bank of Africa (CBA) in Milimani CMCC no. 4203 of 2019 seeking general damages for pain and suffering for injuries the respondent sustained when she slid and fell while leaving the appellant's premises on 15/11/2018.
2. The respondent sustained the following injuries
  - i. Open fracture of the right ankle
  - ii. Pain, swelling and tenderness and deformity
  - iii. 10% degree of permanent incapacity
3. The respondent's evidence was that there was no rubber on the floor. She said the floor had tiles. She said she had used the ramp before.
4. The trial court relied on the case of *Soma Properties Ltd vs Hayyan* (2015) eKLR and also Section 3 of the Occupier's Liability Act Cap 34 Laws of Kenya and found the appellant 100% liable for the accident.



5. The trial court awarded quantum of damages as follows;  
General damages for pain & suffering 500,000  
General damages for diminished earning 1,000,000  
Special damages 42,300  
Future medical expenses 120,000  
Total 1,662,300
6. The appellant has appealed on the following grounds;
  - a. That the learned trial magistrate erred in law and fact in holding and finding that the appellant was to blame for the incident giving rise to the suit before the lower court.
  - b. That the learned magistrate erred in law and fact in failing to take into account the evidence presented before the trial court and in particular failing to appreciate that the respondent was not able to sufficiently establish to the court that the appellant was liable for the respondent's injuries
  - c. That the learned magistrate erred in law and in fact in failing to take into account that evidence presented before the trial court that established that the appellant had discharged the duty of care imposed upon it being the reasonable standard of care expected of an occupier measured against the care to be exercised by a reasonably prudent person in all the circumstances including the practices and usages prevailing in the community and the common understanding of that is practicable and what is to be expected
  - d. That the learned magistrate erred in law and in fact in failing to appreciate that the standard of reasonableness is not one of perfection and that the appellant was not liable if it established that in the circumstances of the case, there were reasonable systems in place to secure the premises against foreseeable risk and danger.
  - e. That the learned magistrate erred in law and in fact in appreciating the evidence adduced and arriving at the conclusion reached that the appellant was solely to blame
  - f. That the learned magistrate erred in law and fact in holding and finding that the respondent had proved his claim against the appellant and in failing to find that the evidence presented by the respondent could not sustain the pleaded claim.
  - g. That the learned magistrate erred in law and fact in making an award of damages particularly the award of damages for diminished earning capacity that was outrageously high, manifestly excessive and unsupported by the evidence before him.
  - h. That the learned magistrate erred in law and fact in making an award of damages that was unwarranted grossly excessive and inconsistent with the evidence and or case law
  - i. That the learned magistrate erred in law and fact in holding and finding for the respondent.
7. The parties filed written submissions as follows; the appellant submitted that the trial magistrate failed to appreciate that the standard of reasonableness is not one of perfection and that the appellant was not liable if its established that in the circumstances of the case there were reasonable systems in place to secure the premises against foreseeable rick and danger. The appellant in support cited *Jamal Ramadhan Yusuf & another vs Ruth Achieng Onditi & Another* [2010] eKLR, where the Court of Appeal stated: that it "is always necessary that the Plaintiff proves negligence with cogent and credible



evidence since the mere fact that an accident occurs does not follow that a particular person has driven negligently or was negligent.” and that “the act neither imposes on the occupier, an absolute common duty of care, nor guarantees a visitor absolute safety but the standard or degree of care depends on the facts of each case.”

8. The appellant further argued that in light of the circumstances the trial magistrate should have only apportioned a measure of blame on the appellant and proposed liability in the ratio of 50:50. On diminished Earning Capacity the appellant argued that the respondent was able to resume work and put in a full day’s work and was only away for 3 months. The only interruption to her future engagements will be limited to the few days necessary for the procedure to remove the metal implants. That therefore the claim for diminished earning capacity is therefore unjustified.
9. The respondent alternatively submitted that Occupiers liability is strict liability and therefore the respondent cannot be guilty of contributory negligence. That section 3 of the Occupiers liability act imposes an obligatory duty to ensure such safety in the manner provided therein. That the appellant owed the respondent a common duty of care to ensure that she was reasonably safe while within their premises.
10. The respondent argued that the slippery tiles and the lack of precautionary warnings at the defendant’s premises which was later followed with the removal of all the slippery tiles and replacement with rubber like floor and further putting up of a warning sign was clear evidence that the appellant only properly ensured the safety of their premises following the respondent’s fall and injuries. Thus the respondent discharged her burden on a balance of probability in proof of the appellants liability.
11. The respondent submitted further that it was in dispute that the respondent suffered a permanent degree of disability and the only thing which differed in the report of the two doctors who examined her was on percentage of disability. The respondent indicated that she had resumed her business operations with a lot of strain and she cannot stand for a long time as a result of her injuries despite her business involving a lot of movement which translates to less working hours and productivity.
12. On diminished earning capacity the respondent submitted that the respondent provided evidence showing that as a result of her injuries her future of any work in the labor market was lessened by her injuries. The appellant did not lead any evidence to dispute the same and therefore the damages for diminished earning are awardable in the circumstances.
13. This being a first appeal, the duty of the first appellate court is to re-evaluate the evidence adduced before the trial court and to arrive at my own conclusion whether to support the findings of the trial court while bearing in mind that the trial court had the opportunity to see the witnesses. In *Selle –Vs- Associated Motor Boat Co.* [1968] EA 123 it was held in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular



circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

14. The issues for determination in this appeal are as follows;
  - i. Whether the trial court was right in holding the appellant 100% liable.
  - ii. Whether the award of damages was outrageously high and manifestly excessive.
15. On the issue as to whether the trial court was right in finding the appellant 100% liable in evidence, the appellant submitted that it had discharged the duty of care imposed upon it being a reasonable standard of costs expected of an occupier measured against the care to be exercised by a reasonable prudent person in all circumstances including the practices and usages prevailing in the community and the common understanding of what is practicable and what is to be expected.
16. I find that the appellant did not call any witness during the hearing of the case to demonstrate that they had taken reasonable care as alleged in their submissions and grounds of appeal.
17. The plaintiff’s evidence that the ramp did not have rubber and that is what necessitated the fall has not been controverted.
18. I find that the trial court was right I holding the appellant 100% liable in negligence.
19. On the issue of quantum of damages, I find that the general damages for pain and suffering and special damages were reasonable.
20. However, there is no basis for awarding general damages for diminished earnings. In [\*Alpharama Limited v Joseph Kariuki Cebron\*](#) [2017] eKLR the court said of assessment of damages for diminished earning capacity:-

“To assess loss of earning capacity in the future, the court must consider to what extent the claimant’s ability to earn income will be affected in the future and for how long this restriction will continue. The traditional approach adopted by the courts when calculating a claim for future loss is to assess what lump sum is needed to compensate the claimant for the future loss. The starting point in this calculation will be to determine what annual net loss the claimant will incur in the future (the “multiplicand”), which is the annual loss of earnings. The multiplicand will then be multiplied by a “multiplier”. The multiplier is assessed having regard to the number of years between the date of the settlement and the date when the loss stops. In a claim for future loss of earnings, this may be the date when the claimant would, but for the injury, have retired”.

21. The respondent said she is still going on with her business.
22. The Court of Appeal decision 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 of either losing his job in future or in case 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 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 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 appropriate financial loss that the plaintiff has suffered as a result of the disability”.

23. I find the claim of diminished earning capacity is unmerited in this case since the trial court did not state what factors were considered and I strike it out.
24. I uphold the claim of general damages for pain and suffering and also special damages.
25. I set aside the claim by the trial court and substitute it with judgment in the sum of ksh.662,300/=.
26. Since the appeal succeeded partially each party to bear its own costs of this appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19<sup>TH</sup> DAY OF OCTOBER, 2023.**

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**A. N. ONGERI**

**JUDGE**

**In the presence of:**

.....for the Appellant

.....for the Respondent

