



**Toyota Kenya Limited v Adero (Civil Appeal E188 of 2023)
[2024] KEHC 12056 (KLR) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12056 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E188 OF 2023
RE ABURILI, J
OCTOBER 4, 2024**

BETWEEN

TOYOTA KENYA LIMITED APPELLANT

AND

JACOB ODHIAMBO ADERO RESPONDENT

*(An appeal arising out of the Judgment & Decree of the Honourable
R.M. Oanda in the Senior Principal Magistrate's Court at Winam
delivered on the 11th October 2023 in Winam PMCC No. 261 of 2022)*

JUDGMENT

Introduction

1. The appellant was sued by the respondent for general damages for pain and suffering and loss of amenities, loss of earnings and earning capacity, future medical expenses and special damages of Kshs. 24,016 as well as costs of the suit following injuries sustained in a road traffic accident.
2. The respondent pleaded that that on or about the 1st October 2020, he was lawfully riding a motor cycle registration number KMDV 159C along the Miwani – Mamboleo road towards the Mamboleo direction when near Great Lakes University the appellant's motor vehicle registration number KCU 967Z while being driven so negligently, carelessly and/or recklessly by the appellant's agents/servant and coming from the Mamboleo direction swerved on to the appellant's lane and collided with him.
3. The appellant filed his statement of defence dated 19th December 2022 denying the respondent's claim in toto and putting him to strict proof. The appellant contended that without prejudice, if the accident occurred as alleged by the respondent then it was due to the respondent's contributory negligence.



4. The parties herein on the 2nd August 2023 recorded a consent judgement on liability at 80% against the appellant and 20% against the respondent herein. The only issue for determination was that of quantum.
5. Subsequently, the trial magistrate entered judgment in favour of the respondent as follows:
General damages for pain and suffering – Kshs. 1,500,000
Loss of future earning capacity – Kshs. 547,393.14
Future medical expenses – Kshs. 300,000
Special damages – Kshs. 24,016
6. Aggrieved by the trial court's judgement on quantum, the appellant filed this appeal vide memorandum of Appeal dated 21st May 2020 in which he raised the following grounds of appeal:
 1. The learned trial erred in law and fact in making the award of general damages in the said judgement that was manifestly excessive in the circumstances as to amount to an erroneous estimate of the loss suffered by the respondent.
 2. The learned trial magistrate erred in law and fact entering judgement for general damages without considering the applicable principles as established by precedent that comparable injuries ought to attract comparable damages and by so doing reached a figure of damages that is inordinately high, arbitrary and totally unupportable by any authority or precedent.
 3. The learned trial magistrate erred in law and in fact in failing to correctly appreciate the plaintiff's injuries and in misapprehending the same and thus arriving at an erroneous award of damages.
 4. The learned trial magistrate erred in law and in fact in making an award for loss of future earning capacity without considering the applicable principals and applying them to the facts.
 5. The learned trial magistrate totally ignored and/or paid lip service to the appellant's submissions and authorities therein cited.
 6. The learned trial magistrate failed to take into account all relevant considerations and principles in assessing the quantum of general damages.
7. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

8. The appellant submitted that similar injuries ought to attract similar awards as was held in the case of *Simon Taveta v Mercy Mutitu Njeru* [2014] eKLR. The appellant further submitted that the trial court made no analysis of the evidence relating to the injuries and by so doing failed to find the correct injuries sustained by the respondent.
9. It was further submitted that the trial court did not analyse the authorities cited by the parties and apply them to the facts of the case and this was a fundamental misdirection that entitles this court's intervention as was held in the cases of *Denshire Muteti Wambua v Kenya Power Lighting Co. Ltd* [2013] eKLR and *Ram Gopal Gupta v Nairobi Tea Packers Limited & 2 Others* [2017] eKLR.
10. It was submitted that the authorities cited by the respondent before the trial court were of little relevance to the case as the injuries sustained in those cases were not the same as those sustained by him



whereas he, the appellant, cited very recent authorities with similar or almost similar and comparable injuries sustained by the respondent.

11. The appellant submitted that an award of Kshs. 400,000 for general damages would have been reasonable and that this court should substitute the trial court's award with the same.
12. The appellant relied on the following cases:
 - i. SBI International Holdings (AG) Kenya v William Ambuga Ongeru [2018] eKLR where the respondent suffered chronic dislocation of the left hip and a fracture of the femoral head as well as bruises on the right thigh and as a result significantly shortened and had a permanent disability assessed at 40% - 45% and the court upheld the award of Kshs. 800,000 in 2018.
 - ii. Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR where the respondent had a degloving injury on the posterior of the left thigh and a compound open knee and femur fracture for which disability had been assessed at 40% as a result of malunion and serious soft tissue injuries and the High Court reduced the award of general damages from Kshs. 2,000,000 to Kshs. 700,000.
 - iii. Rabbi Kiogora Angaine v Jane Karimi Duati [2020] eKLR where the respondent sustained a swollen eye, cut over the knees and a fracture of the femur which healed with thickening and shortening of the leg by 2 inches and the court upheld an award of Kshs. 800,000 by the trial court.
 - iv. David Ogol Alwar v Mary Atieno Adwera & Another [2021] eKLR where the appellant suffered a fracture of mid shaft femur of left inner limb and the appellant was on crutches and a deformed, shortened left leg at the thigh and could thus not use the affected limb and this court held that Kshs. 800,000 as general damages was reasonable and adequate.
 - v. Barnebus v Ombati [2022] KEHC 12136 (KLR) KISII HCCA APPEAL NO. E43 OF 2021 where the respondent sustained a head and chest contusion, bruises on his right hand and waist and fracture of the right femur, fracture of the right humerus and fracture of the pelvic bones and the doctor assessed permanent disability at 5% and the High Court awarded Kshs. 800,000 in general damages in July 2022.
 - vi. Gerald Odera Omollo v Rose Anyango Rayola [2022] eKLR where the respondent suffered a fracture of the right femur, contusion on the pelvis, blunt trauma to the chest and laceration of the left leg and the respondent was likely to develop chronic osteoarthritis due to the instability and the limping gait thus the doctor opined that she needed physiotherapy follow up and analgesics and the High Court upheld an award of Kshs. 600,000 as general damages.
 - vii. Parvat Builders v Makau [2023] KEELRC 575 (KLR) (8 March 2023) (Judgement) where the respondent had sustained fractured left femur – upper 1/3 and a swollen tender and deformed left thigh with 12% permanent incapacity and the ELRC Court set aside the trial court's award of Kshs. 1,400,000 in general damages and substituted it with one of Kshs. 600,000.
 - viii. Kihara & Another v Mutuku [2022] KEHC 15626 (KLR) where the respondent sustained blunt injuries to the chest, blunt injuries left thigh which developed into ecchymosis, bruiss on forearms and fracture of the right femur and the doctor gave permanent incapacity was assessed at 12% with the removal of the K-Nail and the High Court upheld an award of general damages at Kshs. 700,000.
 - ix. United Millers Limited v Wanjiku [2023] KEHC 26808 (KLR) where the respondent sustained two fractures of the right femur and soft tissue injuries and this court set aside the



award of Kshs. 2,000,000 general damages awarded to the respondent and substituted the same with one of Kshs. 800,000.

13. The appellant also sought for the costs of the appeal.

The Respondent's Submissions

14. The respondent submitted that he suffered severe bodily injuries and soft tissue injuries and that on a balance of probabilities he proved the said injuries based on medical documents produced, pleadings and the submissions during trial.
15. It was further submitted that the appellant had not demonstrated how the trial magistrate proceeded on wrong principles or that he misapprehended the evidence so as to arrive at a figure which was inordinately high as set out in the Court of Appeal case of *Bashir Ahmed Butt v Uwais Ahmed Khan* [1982 – 88].
16. The respondent submitted that the award of Kshs. 1,500,000 in general damages for pain and suffering and loss of amenities was reasonable. Reliance was placed on the cases of;
- i. *Robert Gitau Kanyiri v Charles R. Kabiga & Two Others Nakuru HCCC No. 22 of 2009* where the plaintiff was awarded Kshs. 1,000,000 in general damages for pain and suffering and loss of amenities for comparable injuries.
 - ii. *Richard Gituku Gakinya v Anthony Kibirii Waitbaka Nyabururu HCCA No. 48 of 2018* where the court awarded Kshs. 300,000 in general damages for pain and suffering and loss of amenities for injuries comparable to the respondent's herein.
 - iii. *Jaldessa Diba T/A Dikus Transporters & Another v Jospeh Mbiti Isika Machakos HCCA No. 96 of 2011* where the plaintiff was awarded Kshs. 350,000 in general damages for pain and suffering and loss of amenities for comparable injuries.

Analysis and Determination

17. 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, bear in 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. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

18. Further, it is now an established principle of law that an appellate court will only interfere with the judgment of the lower court, if the said decision is founded on wrong legal principles. That was the holding of the Court of Appeal in *Mkuba v Nyamuro* [1983] LLR at 403, where Kneller JA & Hancox Ag JJA held that-

“A Court on appeal will not normally interfere with the finding of fact by a 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 his conclusion.”



19. In *Kemfro Africa Limited T/A Meru Express Services & Gathongo Kanini v A.M. Lubia & Olive Lubia* [1982-88] I KAR 727 at page 730, Kneller J.A. stated:

“The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be 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 damage. See *Ilango v Manyoka* [1967] E.A. 705, 709, 713; *Lukenya Ranching and Farming Cooperative Society Limited v Kalovoto* [1970] E.A. 414, 418, 419. This court follows the same principles.”

20. In the case of *P. J. Dave Flowers Ltd v David Simiyu Wamalwa Civil Appeal No. 6 of 2017* [2018] eKLR rendered itself on the matter of assessment of quantum as below:

“... it is generally accepted from the laid down legal principles on assessment of quantum that personal injuries are difficult to assess with precision and accuracy so as to satisfy the claimant. The courts discretion has been left to individual judges to exercise judicious in respect of the circumstances of each specific case. The sum total of the evidence and the medical reports positive findings will form part of the consideration in the award of damages. The trial court will also be expected to apply the principles in various case law and authorities decided by the superior courts on the matter.”

21. I have considered the grounds of appeal and the submissions tendered together with the authorities cited by both parties’ counsel. As the Respondents did not cross-appeal against the finding and conclusion of the trial magistrate, I find the issue for determination is whether the award for general damages for pain and suffering as well as loss of future earning capacity as pleaded in his memorandum of appeal was too high or manifestly excessive as contended by Appellant.

22. General damages are damages at large whose purpose is to compensate the injured to the extent that such injury can be assuaged by a money award. Courts have severally stated that money cannot renew a physical frame that has been injured and crushed hence the courts can only award sums which must be viewed as giving reasonable compensation. Awards ought to be reasonable and must be assessed with moderation bearing in mind that the large and inordinate awards may injure the body politic. Furthermore, it is desirable that so far as possible comparable injuries should be compensated by comparable awards putting into consideration the current prevailing economic circumstances including inflation (see *Tayab v Kinanu* [1983] KLR 114 and *West (H) & Son Ltd v Shephard* [1964] AC 326, 345).

23. It is not in dispute that the respondent was injured, hence the question is what was the nature and extent of the injuries and what award should those injuries attract. In his plaint dated 10th March 2022, the respondent pleaded that he sustained the following injuries:

- i. Fracture of the right lower limb distal femoral shaft with lateral displacement
- ii. Dislocated right knee joint with obvious deformity
- iii. Shortening of the right lower limb by 7cm
- iv. Deep cut wound on the medial aspect of the left foot
- v. Severe pain on the left shoulder with limited range of motion



- vi. Left shoulder dislocation
- vii. Deep cut wound on the left hip
- viii. Mild head injury with loss of consciousness
- ix. Generalized body pain
- x. Neck tenderness
- xi. Bruises on the right side of the face
- xii. Chest tenderness backache
- xiii. Bruises on the elbow joints

24. The said injuries were restated and confirmed in the medical report by Dr. Sylas Owiti produced as PEx6, the P3 form produced as PEx7 as well as the Discharge summary from JOOTRH produced as PEx2. Dr. Owiti in his medical report dated 29.8.2022 diagnosed the respondent as having sustained; mild head injury, fracture – displacement of right distal femur, right knee dislocation, multiple soft tissue injuries and left shoulder dislocation. He went on to conclude that the injuries sustained amounted to grievous harm and that the approximate percentage of permanent disability was 60% with an estimated cost of treatment and rehabilitation of Kshs. 600,000.
25. The appellant on his part produced a medical report by Dr. Tobias Otieno, an orthopedic surgeon, dated 23rd January 2023 which report was based on documents produced by the respondent and subsequent examinations carried out by the Doctor. Dr. Otieno noted that the respondent had sustained injuries of right femur fracture and multiple deep laceration. He further noted that at the time of examination, the respondent complained of shortness of right leg and left shoulder pain.
26. In his conclusion Dr. Otieno noted that the respondent had a non-union of the right femur that could be improved upon surgery that would cost Kshs. 300,000. He further provided that the respondent's disability level was at 30% but could be improved with the proposed surgery to fix the right femur and thus fall to 10%.
27. I have considered the evidence presented before the trial court. In my view, the evidence presented by Dr. Otieno, in the medical report dated 23rd January 2023 is more convincing for the reasons that he is a specialist being an orthopedic surgeon and further that the report was prepared based on documents produced by the respondent and the subsequent examinations that he carried out on the respondent.
28. Accordingly, I find that the appellant sustained injuries in the nature of multiple soft tissue injuries and fracture of the right femur leading to a shortening of the right leg and disability assessed at 30%.
29. I have equally considered the various authorities that have been relied upon by both parties' counsel. In *Erick Mwiriki & Gideon N Mukingo v Peter Kariuki Wanjiru* [2020] eKLR where the respondent sustained a fracture to the femur, fracture of the distal end of the right tibia, severe soft tissue injuries on the left thigh and severe left tissue injuries to the right ankle and the appellate court reduced the award of general damages to Kshs. 800,000 from Kshs. 1,500,000.
30. In *David Kimathi Kaburu v Dionisius Mburugu Itirai* [2017] eKLR the plaintiff suffered a dislocated hip, and fragmented fractures to the right femur and was awarded Kshs. 630,000 in 2017.
31. In *Florence Njoki Mwangi v Peter Chege Mbitiru* [2014] eKLR the plaintiff in the latter case had sustained fractures of the right and left mid-shaft femur, degloving wound on right tibia and amputation of right foot and multiple cuts. She was awarded Kshs. 700,000 in 2017.



32. The injuries in these authorities are slightly more severe than those of the present Respondent. Adjusting for inflation and considering the Respondent's pain and suffering in the extended period of morbidity, this Court is satisfied that an award of KShs. 900,000 (Nine Hundred Thousand) would be adequate compensation as general damages.
33. Turning to the issue of loss of future earning capacity, I note that though the same was pleaded in the appellant's memorandum of appeal, no material challenge was mounted in the submissions to show that the award by the trial court under this head was arrived at in a wrong manner or on wrong principles. I have reviewed the evidence and set of facts as laid before the trial Court by the appellant. I am contended with the jurisdiction of an appeals court expressly defined in *Peter v Sunday Post Ltd* [1958] EA 424. The discretion as to whether or not to set aside a Judgment of the trial Court is governed by the principles in *Mbogo v Shah C* [1968] EA 93 to wit.

“The appellate Court will not interfere with exercise of discretion unless it is shown that the Lower Court took into account an irrelevant matter which he ought not to have taken into account or that he failed to take into account a relevant matter which he ought to have taken into account or that he has plainly gone contrary in his consideration of the issues raised before him.”

34. Furthermore, there is no dispute that the injuries suffered by the respondent have since disabled him, making it impossible for him to work and eke a living as a bodaboda rider. He was left with a shortened leg. permanent incapacity was assessed at 30% by the appellant's own doctor. The Court of Appeal in *Mumias Sugar Company Limited v Francis Wanalo* [2007] eKLR stated:

“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.

35. In *Butler v Butler* [1984] KLR 225 at 232 Kneller JA stated:

“Loss of earning capacity is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained by Lord Denning M.R. in *Fairely v John Thompson (Design & Contracting Division)Ltd*[1973]2Lloyd's Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”

36. From the injuries suffered by the respondent and the % of permanent incapacity which this court has accepted as assessed by the appellant's doctor, I am satisfied that his earning capacity was diminished



and therefore the trial court did not err in awarding him damages for that and which damages, it has not been shown to be manifestly excessive for this court to interfere.

37. In the circumstances, I find that the appellant has not shown to this court that in determining loss of future earning capacity, the trial court took into account or failed to take into account a relevant matter which he ought to have taken into account or that he went contrary to issues raised before him.
38. The upshot of the above is that I find that this appeal is partially successful to the extent that the award of general damages for pain and suffering and loss of amenities in the sum of Kshs 1,500,000 is set aside and substituted with and award of Kshs. 900,000. The rest of the awards remain the same less 20% contribution as agreed between the parties herein.
39. I order that each party bear their own costs of this appeal which is partially successful.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE

