



REPUBLIC OF KENYA



KENYA LAW
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**Kahora v Mukuna (Civil Appeal E491 of 2024)
[2024] KEHC 13793 (KLR) (Civ) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 13793 (KLR)

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

**CIVIL
CIVIL APPEAL E491 OF 2024**

H NAMISI, J

NOVEMBER 7, 2024

BETWEEN

JOHN NJUGUNA KAHORA APPELLANT

AND

BRIAN MUKUNA RESPONDENT

(Being an Appeal from Judgement of Hon. Rawlings Musiega in Chief Magistrates Court at Nairobi CMCC No. E185 of 2022 delivered on 5 April 2024)

JUDGMENT

1. This appeal arises from a suit filed by the Appellant against the Respondent and one other, jointly and severally, for:
 - i. Special Damages in the sum of Kshs 14,100/=;
 - ii. General Damages;
 - iii. Loss of income;
 - iv. Loss of future earning capacity;
 - v. Future medical expenses;
 - vi. Costs of the suit
 - vii. Interest on (a), (b) and (c) at present court rates
2. The particulars of the suit are that on 10 September 2021, the Appellant was a lawful pedestrian along the Marurui – Garden City Road, when the Respondent so carelessly and/or negligently drove.



- Managed and/or controlled motor vehicle registration number KBS 459V that the same veered off the road and hit the Appellant, causing him severe bodily injuries. The injuries sustained by the Appellant were:
- i. Blunt head injuries with loss of consciousness;
 - ii. Liver laceration
 - iii. Spleen laceration
 - iv. Compound (open) fracture of the left femur
3. The Respondent and one other entered appearance and filed their Statement of Defence dated 23rd May 2022, denying the allegations by the Appellant.
4. Parties recorded consent as follows: Liability be apportioned at 75:25 in favour of the Appellant; the Appellant's List of Documents dated 3 March 2022 be adopted without calling witnesses; the Respondents' Medical Report dated 16 January 2023 be adopted without calling the witnesses; parties to file submissions.
5. The trial court entered judgement on 5 April 2024 in favour of the Appellant as follows:
- i. General damages in the sum of Kshs 794,000/=
 - ii. Special damages in the sum of Kshs 14,100/= with interest from the date of filing;
 - iii. Costs of the suit
6. Aggrieved by the said judgement, the Appellant filed their Memorandum of Appeal dated 15 April 2024 on the following grounds:
- i. That the learned Magistrate erred in law and fact in totally disregarding the Appellant's evidence and submissions in the lower court on loss of income/future earning as pleaded;
 - ii. The Learned Magistrate erred in law and fact by making a finding that the Plaintiff had not produced evidence to show his occupation and income, despite sufficient evidence to that effect hence arriving at a wrong conclusion.
7. The Appeal was canvassed by way of written submissions.

Analysis and Determination

8. This being the first appeal, it is this court's duty under Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. This principle of law was well settled in the case of *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123.
9. In the trial court, the Appellant produced a bundle of documents in support of his claim. The documents included copy of Police Abstract, copy of P3 Form, Medical receipts, copy of Records, copies of treatment notes, copy of the Appellant's national identity card, copy of demand letter, Medical Report by Dr. Wokabi, Discharge Summary, Xray pictures and a copy of the Appellant's driving licence.
10. In his submissions at the trial court, the Appellant relied on his driving licence, copy of national identity card and the *Regulation of Wages (General) (Amendment) Order*, 2018 to argue that the minimum



wage for a driver is Kshs 23,039/=. Based on this, the Appellant submitted for an award of Kshs 1,935,276/= for loss of future earning.

11. In its judgement, the trial court relied on the cases of *SJ v Francesco Di Nello & Another* [2015] eKLR, *Cecilia W. Mwangi & Another v Ruth W. Mwangi* [1997] eKLR and *Douglas Kalafa Ombeva v David Ngama* [2013] eKLR. The trial court observed that nothing had been produced to show that the Appellant was a driver or that he was making the amount claimed. The court stated thus:

“I am left to grapple with the question whether he was a taxi driver or a PSV driver or private driver. With the questions above lingering, I am also unable to comprehend how he made Kshs 2,000/= per day. There was no proof of the same. I decline the claim.”

12. In the submissions herein, the Appellant argued that the finding of the trial court that the Appellant had failed to prove his occupation was erroneous since the Appellant had produced a driver’s licence and NTSA Driving Licence expressly indicating “TAXIS” at the bottom. These two documents, coupled with Dr. Wokabi’s Medical Report that stated that the Appellant’s occupation is driver are sufficient evidence for the court to have awarded damages for loss of income.

13. In the SJ Francesco Di Nello case (*supra*), the Court of Appeal held that:

“Claims under the heads of loss of future earning capacity are discretionary 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 domination in earning capacity in earnings 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”

14. Based on the foregoing case, the damages under the two limbs are distinguishable. Whereas future loss of income is uncertain and has to be estimated, loss of income is calculated up to the date of trial and conclusion of the suit. In this instance, for loss of income, the Appellant argued that the duration was provided by Dr. Wokabi to be 6 to 8 months of surgery and 18 months after the surgery.

15. In the trial court, it was the Appellant’s argument that in the absence of evidence to prove the income of Kshs 2,000/- per day, the court ought to rely on the *Regulation of Wages (General) (Amendment) Order*, 2018, which set the minimum salary for a driver at Kshs 23,039/- per month. In my considered view, the referenced Order is inapplicable in this particular situation. Moreso, because as duly noted by the trial court, it is not clear whether the Appellant was employed to drive a taxi, or driving his own taxi. In short, other than the mere averment of earning Kshs 2,000/- and production of a driving permit indicating “taxi”, no evidence was led to substantiate the claim under this limb.

16. This court must be careful not to interfere with the trial court’s discretion unless certain conditions are met. These conditions were set out in the case of *Kemfro Africa Limited t/a “Meru Express Services (1976)” & Another v Lubia & Another (No 2)* Civil Appeal No 21 of 1984 [1985] eKLR thus:

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.



17. In view of the foregoing, I find that the Appeal is unsuccessful and the same must fail. The appeal is dismissed with costs to the Respondent, assessed at Kshs 40,000/=.

DATED AND DELIVERED AT NAIROBI THIS 7 DAY OF NOVEMBER 2024.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. koko for the Appellant

Mwangi for the Respondent

