



REPUBLIC OF KENYA



KENYA LAW
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**Ongaga v Omocha Enterprises Ltd (Civil Appeal 72 of 2022)
[2024] KEHC 14543 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14543 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL APPEAL 72 OF 2022
TA ODERA, J
NOVEMBER 14, 2024**

BETWEEN

JAPHET OMANGA ONGAGA APPELLANT

AND

OMOCHA ENTERPRISES LTD RESPONDENT

*((Being an appeal from the Judgment delivered by Hon. B. BARASAH
(RM) on 30th August, 2022 in Ogembo CMCC NO. 19 OF 2020))*

RULING

Introduction

1. This Appeal arises from the Judgment delivered on 10th March, 2023 in Kisii Ogembo CMCC NO. 19 OF 2020 on the following terms.
 - a. Liability 80:20 in favor of the plaintiff against the defendants jointly and severally.
 - b. General damages award at; Kshs. 1,000,000/=
 - c. Future medical evidence award at Kshs.200,000/=
 - d. Special damages award at Kshs 200,000
 - e. Less 20%. Kshs 280,0000
Total Kshs. 1, 120,000
 - f. Costs of the suit and interests on special damages from the date of filing of the suit and general damages from the date of this judgement were awarded to the plaintiff.
2. Being aggrieved by the Judgment of the lower court the Appellant filed the Appeal herein which was based on the following grounds of Appeal;



- i. The learned magistrate erred in law and in fact by awarding the Appellant 1,000,000 as general damages for pain and suffering which award was inordinately low as to amount to an erroneous estimate of loss and damage suffered by the appellant considering the nature of injuries suffered.
 - ii. That the learned trial magistrate erred in law and in fact by awarding the appellant a sum of Kshs. 200,000 as costs for fitting the artificial limb and other medical expenses which award was so inordinately as to amount to an erroneous estimate.
 - iii. The learned trial magistrate erred in law and in fact by failing to award the appellant damages for loss of earning capacity despite the same being pleaded.
 - iv. The learned trial Magistrate erred in law and fact in failing to evaluate the injuries sustained by the Appellant on the medical documents and/or report availed as evidence by the appellant.
 - v. The Learned Magistrate erred in fact and in law in failing to consider the Appellants submissions and legal authorities relied upon in his Judgement.
 - vi. The learned trial Magistrate's decision on quantum is albeit a discretionary one was wrong.
3. Based on the above ground the appellant sought from this court the following orders:
 - a. This Appeal be allowed with costs.
 - b. The lower court's judgment of the lower court on quantum be reviewed and this court be pleased to enter a judgment in favor of the Appellant as per the Appellant's submissions in the lower court.
 - c. The appellant prays for costs of this Appeal.
4. The background of the matter is that the Respondent filed a suit against the Appellant seeking;
 - a. General damages for pain and suffering and future medical expenses.
 - b. General damages for loss of earning capacity and costs of fitting an artificial limb.
 - c. Special damages of Kshs 222, 059
 - d. Costs of the suit together with interests.
5. To support her claim, the Appellant alleged that on 11th August 2019 he was a lawful pillion passenger on motor cycle registration number KMED 709 D along Itumbe-Igare road at Nyambunde area when motor vehicle registration number KCS 073A that was being driven carelessly and negligently lost control and hit the motor cycle leading to the plaintiff suffering severe injuries which included contusion on the left leg, compound fracture of the left tibia and fibula, amputation of the left leg, massive blood loss/hemorrhage and permanent disability assessed at 50%.
6. In its defense the Appellant denied allegations against it and pleaded that if an accident had occurred (which they denied) the same was caused by the reckless, negligence and or the careless act or omissions on the part of the appellant and or the rider.
7. The trial court upon hearing the parties the trial court delivered a judgment wherein held as follows;

The plaintiffs have proposed 5,932,059 /- as sufficient award for the damages compensation court notes that the same is too high considering that the plaintiff was elderly and 69 years of age.



I will rely on previously decided cases with similar injuries to make my determination putting into mind the cost of inflation too. In *Penstony Limited and another vs. Samuel Itonye Kianguku* {2021} eKLR an award of 1,400,000 as general damages. 225,578 as special damages. 180,000 as future medical expenses awarded by Orenge SRM was reduced to: 800,000-general damages and 225,578 was by Hon. Judge Meoli although the permanent disability therein had been awarded at 4% and there was metal implant that was to be removed.

I will also put into mind that the plaintiff was a 69-year-old man who could not actively participate in farming hence the future earning capacity limb was not satisfied.

Liability 80:20% in favor of the plaintiff

General damages-1,000,000 .

Future medical expense- 200,000

Special damages- 200,000

Total-1,400,000

Less 20%--280,000

Total 1,120,000

The plaintiff is also awarded costs and interests of the suit from the date of judgment.

8. It is against this Judgment that the Appellant has approached this court in the manner hereinabove highlighted.

This court directed that the Appeal be disposed of by way of written submissions. Both parties filed their submissions which I have considered in my determination herein below.

Issues of Determination

9. Having analyzed the grounds of Appeal, reviewed the written submissions of the parties in respect to this appeal and re-evaluated the evidence presented at the trial and also considered the Judgment of the trial, I find that the issues for determination are:
- Whether the learned magistrate erred in law and in fact by awarding the Appellant 1,000,000 as general damages for pain and suffering to warrant a review of the same by this court.
 - Whether the learned trial magistrate erred in law and in fact by awarding the appellant a sum of Kshs. 200,000 as costs for fitting the artificial limb and other medical expenses to warrant a review by this court.
 - Whether the learned trial Magistrate erred in law and in fact by failing to award the appellant damages for loss of earning capacity.

Analysis and Determination

a. Whether the learned magistrate erred in law and in fact by awarding the Appellant 1,000,000 as general damages for pain and suffering to warrant a review of the same by the trial court.

10. The principles under which an appellate court can interfere with an award of damages made by a trial court were set out by the Court of Appeal in the case of *Kemfro Africa Limited T/A Meru Express*



Services [1976] and another v Lubia and another (No.2) [1985] eKLR, in which the Court (Kneller, Nyarangi, JJA and Chesoni, Ag JA) stated as follows:

“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 that 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 *Ilanga v Manyoka*, [1961] EA 705, 709, 713 (CA-T); *Lukenya Ranching and Farming Co-operative Society Ltd v Kavoloto*, [1979] EA 414, 418, 419 (CA-K). This Court follows the same principles.”

11. Equally in the case *Shabani v City Council of Nairobi* [1985] KLR 516 at page 518, Hancox, JA stated as follows:

“The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt v Khan, Civil Appeal No. 40 of 1997* (a case referred to in another context by the learned Judge), as follows:

‘An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that, he misapprehended the evidence in some material respect, and so arrived at a figure which was so inordinately high or low.’

This discretion has since been followed frequently by this Court.”

12. The learned counsel for the Appellant in his submissions argued that the award of 1,000,000 as general damages to the appellant who suffered injuries that led to his left leg being amputated and a permanent disability assessed at 50% was so inordinate and manifestly inconsistent with comparable precedent awards made in similar cases. The learned counsel thus urged the court to review the award and increase the same to Kshs. 2,000,000 taking into account comparable precedents and the rate of inflation. In support of his case the learned counsel relied among other cases the cases of;
- a. *Daniel Kosgei Ngelechei VS Catholic Registered trustee of Edoret and another* (2013) eKLR where the court awarded a plaintiff who had suffered amputation of the lower left limb, loss of two incisors among other injuries a sum of Kshs. 2,100,000 as general damages for pain and suffering
 - b. *CM (minor suing through mother and next friend, MN) VS Joseph Mwangaingi Maina* (2018) eKLR where the court awarded 2,000,000 as general damages for pain and suffering to a minor who sustained serious injuries on her leg leading to the same being amputated below the knee.
 - c. *John Kipkemboi and another vs Moris Kedolo* (2019) eKLR where a victim who has sustained several injuries leading to amputation of his left leg below the knee being amputated was awarded Kshs 2,500,000 as general damages for pain and suffering.
13. The trial court in the arriving at its decision to award the appellant sum of Kshs. 1,000,000 was guided by the decision in the case of *Pestony Limited & another v Samuel Itonye Kagoko* [2022] eKLR. However, I note that unlike in the instant case where the Appellant suffered



an amputation of the left lower limb the respondent therein sustained a fracture of the left femur (mid-shaft) and swollen left tender thigh. I equally note that in the said case Permanent incapacity was assessed at 5% while in this case permanent disability was assessed at 50%. The injuries of the appellant were thus more severe than the ones in the said Pestony case. I therefore agree with the learned counsel that the court relied on a case where the injuries were not comparable to the injuries of the appellant in arriving at her award of damages. I equally find the injuries in the case law cited by the appellant are comparable to the injuries in this case. The proposal of Kshs. 2,000,000 as award for general damages for pain and suffering is adequate and reasonable.

Whether the learned trial magistrate erred in law and in fact by awarding the appellant a sum of Kshs. 200,000 as costs for fitting the artificial limb and other medical expenses to warrant a review by this court.

14. The learned counsel for the Appellant submitted that the lower court gave an award of Kshs. 200,000 as award for medical expenses without any explanation on how the same was arrived at or the computation for the same. The learned counsel while relying in the case of Akwaba Olubuliera Nichodemus vs Dickson Shikuku (2022) eKLR argued that given that the plaintiff had testified that he will require an artificial after every 3 years of his entire life, considering that he stated that he was 69 years at the time of the accident; considering that the life expectancy being 73.6, there was need for this court to use 3 years as denominator, Kshs 200,000 (being the cost of a prosthesis) as the multiplier and lifespan of 4 years to arrive at a sum of Kshs. 266,667 as the cost for future medical evidence.
15. While trial court did not support the award of Kshs. 200,000/= in the judgment and while the explanation of the learned counsel appears to be sound and worth being considered by this court, I note that the cost of a prosthesis was estimated by Dr. Nyameino in his medical report as ranging between 150,000 to 200,00/= . From the above stated submissions by the appellant that life expectancy is at 73.4 years by appellant would require the artificial limb for about 4 years only. The doctor indicated that limb requires changing after every 3 years. That means the appellant would require 2 of the said limbs in his life time. Though the appellant submitted that the appellant will need Kshs 266,667/= as the cost of prosthesis for a period of 4 years. I am unable to fathom how he will use the 66.677/= to get a prosthesis for one year. It would be convenient for the appellant to get 2 prostheses at Kshs. 200,000/= each making a total of Kshs. 400,000/= . I proceed to award Kshs. 400,000/= under this head.

Whether the learned trial Magistrate erred in law and in fact by failing to award the appellant damages for loss of earning capacity

16. The learned counsel argued that the learned trial magistrate erred by not awarding of loss of earning capacity by the trial court. He argued that the learned trial magistrate erred when she observed that the appellant being 69 years he could not engage in farming. He argued that the Appellant did specifically plead for general damages for loss of earning capacity and proved the same.
17. While it is true as submitted by the learned counsel that the learned court erred in not considering extensively an award of loss of earning capacity, it should be noted that courts have held that the same is part of general damages. For instance, In FAIRLEY V JOHN THOMSON LTD [1973] 2 LLOYD'S LAW REPORTS 40 at pg. 14 wherein Lord Denning M.R. observed that Compensation for diminution in earning capacity is awarded as part of general damages.”
13. Having enhanced the general damages from Kshs. 1000,000/= to Kshs. 2,000,000, I find that the same encompasses an award for loss of earning capacity as a general damage and thus do not see the need to award the same separately.



18. The appeal has therefore succeeded in part, and this Court hereby sets aside the judgment of the lower Court and substitutes therefore, the judgment for the Appellant against the Respondent, in the following terms:

- a. General damages for pain and suffering- Kshs. 2,000,000/-
 - b. Special damages – Kshs. 200,000/-
 - c. Future medical expenses- Kshs. 400,000/=
- Less 20% Kshs 520,000/=
- Total - Kshs. 2,080,000/=

I also award costs of the appeal to the appellant and interest from the date of the lower Court's judgment.

19. It is so ordered

TA. ODERA

JUDGE

14.11.24

Delivered virtually via teams platform in the presence of:

N/A for the Appellant

N/A for Respondent

Court Assistant - Oigo

