



**Kathambi v Mwirichia & another (Civil Appeal E093 of 2023)
[2024] KEHC 15482 (KLR) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E093 OF 2023
CJ KENDAGOR, J
DECEMBER 4, 2024**

BETWEEN

JOY KATHAMBI APPELLANT

AND

STANLEY MUTWIRI MWIRICHIA 1ST RESPONDENT

MUNGANIA MUTHOMI EDWARD 2ND RESPONDENT

*(Being an appeal against the Judgment of Hon. T.M. Mwangi, Senior Principal Magistrate
in Meru CMCC No. E289 of 2022 delivered on 18th May, 2023, on quantum damages)*

JUDGMENT

Introduction

1. The Appellant was involved in a road traffic accident on 9th May, 2021 along Meru-Nkubu Road where she sustained bodily injuries. She was standing meters away from the road when the 2nd Respondent's motor vehicle, while under the control of the 1st Respondent, veered off the road and hit her. She was rushed to the hospital and admitted for two months. She blamed the Respondents for the accident and sued them seeking general damages for pain and suffering, loss of amenities, and loss of earning capacity. She also sought Future Medical Expenses of Kshs.150,000/= and Special Damages of Kshs.97,369/=.
2. The Respondents failed to file a statement of Defense and the Court entered an interlocutory judgment on 31st January, 2023. The matter proceeded for formal proof. The Court delivered a judgment on 18th May, 2023 in favor of the Appellant in the following terms; It awarded her Special Damages at Kshs.35,900/= and General Damages at Kshs.1,050,000/=. The award for General Damages included an award of Kshs.150,000/= for Future Medical Expenses and Kshs.900,000/= for Pain and Suffering. It also awarded her costs and interest at 10%.



3. The Appellant was dissatisfied with the Judgment and appealed to this Court vide a Memorandum of Appeal dated 16th June, 2023 in which she listed the following Grounds of Appeal;
 1. The Learned Trial Magistrate erred in law and in fact in finding that the [Appellant] was entitled to general damages of Kshs.1,050,000/= which was too much on the lower side in view of the injuries suffered by the Appellant and that this presents a miscarriage of justice.
 2. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions and judicial authorities on quantum thereby arriving at an erroneous figure on quantum.
 3. The Learned Trial Magistrate erred in law and in fact by failing to consider conventional awards for general damages in cases of similar injuries and awarded Kshs.900,000/= as general damages for pain and suffering which is very low.
 4. The Learned Trial Magistrate erred in law and in fact in failing to award damages for loss of amenities whereas the Appellant's work, family, and social life had been affected by the injuries sustained.
 5. The Learned Trial Magistrate erred in law and in fact by failing to consider the Appellant was working prior to the accident and entitled to damages for loss of earnings from the date of accident to the date of trial as well as loss of earning capacity due to the injuries sustained.
 6. The Learned Trial Magistrate erred in law and in fact when making his award by failing to consider the passage of time and incidence of inflation.
4. The Appellant asked the Court to allow the appeal and set aside the judgment of the Honorable T.M. Mwangi delivered on 18th May, 2023. She also requested the Court to re-assess the general damages payable to the Appellant.
5. The Appeal was canvassed by way of written submissions. The Respondents did not file submissions.

Appellant's Written Submissions

6. The Appellant submitted that the trial Court's award for Pain and Suffering was inordinately low. She submitted that the trial Court failed to compare the injuries she sustained with other previously decided cases. She argued that a sum of Kshs.2,000,000/= would be sufficient and reasonable for the pain and suffering she underwent. On this issue, she relied on *Lucy Waruguru Gatundu v Francis Kinyajui Njuku* [2017] eKLR and *Peter Ngigi Kamau vs Philip Kamau Njuguna* [2011] eKLR.
7. The Appellant also faulted the lower Court for failing to award her damages for loss of amenities. She argued that the injuries sustained as a result of the accident had affected her work, family, and social life. She argued that this award was merited because she suffered a 20% permanent incapacitation and was unable to carry out her normal duties as she used to do them before the accident. She asked the Court to award her Kshs.300,000/= under this heading.
8. The Appellant also faulted the trial Court for failing to award her damages for loss of earnings from the date of the accident to the date of trial. She submitted that she was entitled to damages under this heading because, as a result of the injuries sustained, she could not operate as a cleaner during this period because she was using clutches for movements. She asked the court to award her Kshs.187,000/= under this heading.



9. Lastly, the Appellant faulted the trial Court for failing to award her loss of earning capacity, whereas it was clear that she would no longer be able to work as she used to work due to the injuries sustained. She also argued that the 20% disability sustained diminishes her chances of getting alternative and or better jobs in the labour market. She asked the Court to award her Kshs.1,500,000/= under this heading. On this issue, she relied on the case of John Kipkemoi & Another vs Morris Kedelo and Mehari Tewoldget T/A Mehari Transporters Ltd vs Muasya Maingi [2013] eKLR.

Issues for Determination

10. I have considered the Grounds of Appeal and submissions by the Appellant and I am of the view that the issue for determination is;
- a. Whether the award of Kshs.900,000/= for Pain and Suffering was a reasonable estimate
 - b. Whether the Appellant is entitled to an award for loss of earning capacity/ Diminished Earning Capacity
 - c. Whether the Appellant is entitled to an award for loss of Earnings

The Duty of the Court

11. It is trite law that the duty of the first appellate Court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions. As the Court is re-evaluating the evidence, it is required to bear in mind that it had neither seen nor heard the witnesses. This principle was set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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 ...”

Whether the award of Kshs.900,000/= for Pain and Suffering was a reasonable estimate

12. It is a well-established principle in our legal system that an appellate Court should exercise caution and restraint where it has been called upon to review a trial Court’s award of damages. The principle provides that an appellate Court should only review an award for damages where the trial Court acted on a wrong principle of law, or misapprehended the facts, or made a wholly erroneous estimate of the damage suffered. This principle was restated by the Court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55, where it stated:-

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”



13. I have relooked at documentary evidence placed before the trial Court with a view to ascertaining the nature of injuries sustained by the Appellant. The Appellant relied on a medical report prepared by Dr. Kimathi and dated 4th August, 2022. The report indicated that the Appellant sustained Right Tibia Fracture, Right Fibula Fracture, and an open wound involving deep soft tissue damage on right leg. The Appellant underwent several medical procedures which included external fixation of right Tibia for 4 months, skin grafting of open wound, removal of external fixation, and Tibia Nail Insertion. The doctor testified in Court and the medical report was duly produced as an exhibit.
14. I have also looked at the evidence to determine the gravity of the injuries and the extent to which they had impacted the Appellant's life. The medical report indicated that the Appellant sustained a permanent incapacity of 20%. It also stated that the Appellant had a weak limb and walked in a limping gait. The doctor also wrote that there was swelling of the right foot with stiffness of the ankle joint. Lastly, the medical report indicated that the Appellant could not perform her normal duties independently and was still using crutches for movement. I note that the medical examination was done in August 2022, which was 15 months after the accident.
15. I note that the Respondents did not participate in the proceedings at the trial Court, and thus, the Appellant's testimony and documentary evidence were not controverted or challenged. From the medical report and the Appellant's testimony, one can infer that the injuries sustained were a right Tibia Fracture, Right Fibula Fracture, and an open wound involving deep soft tissue damage on the right leg. I also find that she sustained a permanent incapacity of 20%. The Appellant could not perform her normal duties, at least for the first 15 months after the accident.
16. Having ascertained the nature of injuries sustained, the next issue for determination is whether the damages awarded for Pain and Suffering are commensurate with the said injuries. In the case of *Penina Waithira Kaburu v LP* [2019] eKLR, the Court outlined factors that should guide a court in arriving at the correct estimate of quantum of damages. It held:-

“While no injuries occurring in different circumstances can be similar in every respect and hence the possibility of varied awards in general damages, the trial court must always make a comparative analysis of the injuries sustained and the extent of the awards made for similar injuries in previous decisions. As I have stated elsewhere, if not for anything else, the comparison is necessary for purposes of certainty and uniformity; the award, must, as far as possible, be comparable to any other award made in a previous case where the injuries for which the award are relatively similar.”
17. Similarly, in *Charles Oriwo Odeyo vs. Appollo Justus Andabwa & Another* [2017] eKLR, the Court established parameters that should help determine the appropriateness of an award of damages and held as follows:-
 1. “An award of damages is not meant to enrich the victim but to compensate such victim for the injuries sustained.
 2. The award should be commensurable with the injuries sustained.
 3. Previous awards in similar injuries sustained are mere guide but each case be treated on its own facts.
 4. Previous awards to be taken into account to maintain stability of awards but factors such as inflation should be taken into account.”



18. The above authorities underscore the principle that, generally, the Courts should make similar awards for persons who have suffered similar injuries. They also mandate the appellate Court to conduct a comparative analysis of injuries sustained and the extent of the awards made for similar injuries in previous decisions. The Court of Appeal in *Odinga Jacktone Ouma V Moureen Achieng Odera* [2016] eKLR summarized this principle in the following terms; “comparable injuries should attract comparable awards”
19. I have found the following cases quite helpful in terms of comparison:-
- In *Anyumba & 2 others v Towett* [2023] KEHC 24421 eKLR, the High Court awarded a Respondent General Damages at Kshs.1,000,000/=. The Plaintiff in that matter had sustained soft tissue injuries on his leg, and fractures on his right femur and right tibia and fibula. I note that the injuries in that case are similar to injuries sustained by the Appellant in the instant case. They both suffered fractures on their right Tibia and Fibula as well as other soft tissue injuries on their right legs. In addition, they both suffered 20% permanent disability. The only difference between the two cases is that the Plaintiff in Anyumba case also suffered a fracture on his right femur, unlike the Appellant.
20. In *Jacaranda Bodaboda Operators & another v Nyasero* [2023] KEHC 23806 eKLR, the Court awarded plaintiff General Damages for Pain and Suffering at Kshs.750,000/=. The plaintiff in that case suffered fracture of the shaft of the right femur, he was operated on, and the fracture fixed with a metal implant. He walked on crutches and was not able to work and had difficulties getting around. His permanent disability was assessed at 10% and required between 12-15 months from the date of the examination to heal fully. Notably, the Plaintiff in that case suffered a much lower degree of permanent incapacity than the Appellant in the instant case who suffered a 20% permanent incapacity.
21. In view of the above recent authorities, I find that the award of Kshs.900,000/= for Pain and Suffering is adequate compensation for the injuries suffered. The award of the trial Court is therefore upheld.

Whether the Appellant is entitled to an award for loss of earning capacity/ Diminished Earning Capacity

22. The Appellant faulted the trial Court for failing to award her loss of earning capacity. She also argued that the 20% disability sustained diminishes her chances of getting alternative and or better jobs in the labour market.
23. The trial Court dismissed this prayer and held as follows; “[the Appellant] said that before the accident she worked at Kenya Medical Training College (KMTC) and that she cannot perform her normal duties out of pain which evidence was collaborated by medical evidence. However, she did not present evidence from KMTC or from other source to collaborate to what extent she is incapacitated from working from her bodily injuries.”
24. In the case of *Jacaranda Bodaboda Operators & another v Nyasero* [2023] KEHC 23806 eKLR, the Court declined a prayer for Loss of Earning Capacity because the and held as follows;

“The trial court made an award of diminished earning capacity because the Respondent had suffered 10% permanent incapacity. In my view, there was no basis to award diminished earning capacity as the same was not supported by the medical report and the evidence of the doctor who examined the Respondent. The doctor in his evidence said that after recovery the Respondent would be able to resume some work. The doctor was not asked whether the injury had any lifelong effect on the Respondent’s capacity to do construction work.



More so, the Respondent was not examined after the recovery period to determine whether his capacity to do construction work was affected by the injury. The award of diminished earning capacity was therefore not supported by evidence. It is therefore my view that the award of Ksh.200,000/= for diminished earning capacity was wrongly awarded and the same is set aside.”

25. In the instant case, there was no basis to award diminished earning capacity as the same was not supported by the medical report and the evidence of the doctor who examined the Appellant. The Doctor only stated that “There is swelling of the right foot with stiffness of the ankle joint. She therefore cannot perform her normal duties independently. Still using crutches for movement.” The doctor did not tell whether the injury had any lifelong effect on the Appellant’s capacity to do cleaner work. More so, the Appellant was not examined after the recovery period to determine whether her capacity to do the cleaner work was affected by the injury. I thus cannot fault the trial Court for failing to grant this award.

Whether the Appellant is entitled to an award for loss of Earnings

26. The Appellant faulted the trial Court for failing to award her damages for loss of earnings from the date of the accident to the date of trial. She submitted that she was entitled to damages under this heading because, as a result of the injuries sustained, she could not operate as a cleaner during this period because she was using clutches for movements. She asked the Court to award her Kshs.187,000/= under this heading.

27. The trial Court dismissed this prayer and stated as follows;

“the court appreciates that [the Appellant’s] injuries have somewhat affected her ability to work as compared to before the accident. In her plaint PW1 prayed for an award for loss of earnings. However, for want of presentation of sufficient evidence, this court found it unable to compute this award.”

28. In the case of *Jacaranda Bodaboda Operators & another v Nyasero* [2023] KEHC 23806 eKLR, the Court declined a prayer for loss of earnings and held as follows;

“In his amended Complaint dated 10th March 2021, the Respondent pleaded for damages for loss of income for 17 months when he was out of work. This was a claim for loss of income during the recovery period. It was not a claim for diminished earning capacity. Being a claim for loss of income during the recovery period the claim had to be proved through tendering of evidence. The Respondent claimed that he was a construction worker and that his monthly earnings was Ksh.17,000/=. He did not produce evidence to prove that. The claim for loss of income during the recovery period was not proved.”

29. I have reviewed the documentary evidence produced before the trial Court, and I agree with the Court that the Appellant did not provide sufficient evidence to justify an award for loss of earnings.

Disposition

30. The Appeal lacks merit and is hereby dismissed.
31. No order as to costs.
32. It is so ordered.



**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS
ONLINE PLATFORM ON THIS 4TH DAY OF DECEMBER, 2024.**

.....

C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

Mr. Ngeera, Advocate for the Appellant

