



**Kinuthia v Wachira (Civil Appeal E440 of 2023)  
[2024] KEHC 15333 (KLR) (Civ) (4 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15333 (KLR)

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

**CIVIL**

**CIVIL APPEAL E440 OF 2023**

**JM OMIDO, J**

**DECEMBER 4, 2024**

**BETWEEN**

**EDWIN NG'ANG'A KINUTHIA ..... APPELLANT**

**AND**

**PAUL WANJOHI WACHIRA ..... RESPONDENT**

*(Being an appeal from the Judgement and Decree of Hon. Rawlings Liluma,  
SRM delivered on 5th May, 2023 in Milimani CMCC No. E13130 of 2021)*

**JUDGMENT**

1. This judgment determines the Appellant's appeal filed on 31<sup>st</sup> May, 2023 vide the Memorandum of Appeal dated 8<sup>th</sup> May, 2023. This appeal relates only to the issue of quantum.
2. The Appellant who was the plaintiff before the trial court presented the suit, a tortious liability claim vide a plaint dated 2<sup>nd</sup> November, 2021. The Appellant pleaded that he sustained bodily injuries following a road traffic accident that occurred on 22<sup>nd</sup> June, 2021.
3. The accident occurred while the Appellant was riding motor cycle registration number KMCS 902R along Kangundo Road where he was knocked down by motor vehicle registration number KBD 536J that was registered in the name of the Respondent.
4. The issue of liability was determined by the trial court at 100% against the Respondent in the judgement that was delivered on 5<sup>th</sup> May, 2023.
5. On quantum, the learned trial Magistrate, Hon. Rawlings Liluma proceeded to assess damages under the various heads as follows:
  - a. Special damages - Ksh. 19,800/-.



- b. General damages - Ksh.850,000/-.
6. The Appellant was also awarded costs of the suit and interest.
7. It is that judgment that gave rise to this appeal where the Appellant now complains, vide the Memorandum of Appeal dated 8<sup>th</sup> May, 2023, that:
- i. The learned Magistrate erred in law and in fact in failing to appreciate the relevant principles, case law and the submissions on record in assessing damages and therefore arrived at a very low award on damages.
  - ii. That the learned trial Magistrate misdirected himself and failed to give any due and proper consideration to the pleadings and evidence on record and submissions and thereby made an erroneous judgement on damages.
8. As observed above, the appeal is against quantum of damages only, save to add that the award under the head of special damages was not challenged.
9. The appeal was admitted to hearing on 6<sup>th</sup> August, 2024. On 8<sup>th</sup> May, 2024, this court gave directions that the appeal be canvassed by way of written submissions and both sides complied by filing their respective submissions, albeit outside the timelines that the court granted.
10. A first appellate court is mandated under Section 78 of the *Civil Procedure Act* to re-evaluate and re-assess the relevant evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal, while bearing in mind that it did not see or hear the witnesses when they testified.
11. This court is therefore empowered to subject the evidence to a fresh and exhaustive scrutiny and make conclusions on it, while bearing in mind that the witnesses did not testify before it. This duty was espoused in the case of *Selle v Associated Motor Boat Co. Ltd* [1969] E.A. 123 in which Sir Clement De Lestang observed that:

“This Court must consider the evidence, evaluate it itself and draw its own conclusions, though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he had 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

12. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that:

“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 allowances in this respect”

13. In *Peters v Sunday Post Ltd* [1958] EA 424, the Court held that;

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if



there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”

14. Similarly, in *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the same court stated with regard to the duty of the first appellate court 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.”
15. This being an appeal on quantum only, the application of Section 78 of the *Civil Procedure Act* will be limited to the evidence on the injuries that the Appellant sustained and the assessment that the court made on the same.
16. Going to the trial court’s record, the Appellant pleaded that he sustained the following injuries:Fracture of the right femur.Fracture of the right distal tibia.
17. The Appellant testified before the lower court and adopted the contents of his statement dated 2<sup>nd</sup> November, 2021 as his evidence in chief. He told the court that he sustained injuries in the accident and was later reviewed by Dr. J.L. Okere, who prepared a medical report on his findings.
18. The Appellant stated that the resultant effect of the accident meant that he was unable to perform his regular duties as a bodaboda operator, a business that earned him Ksh.30,000/- monthly.
19. The Appellant produced the following documents in support of quantum:P3 form.Dr. Okere’s medical report and receipt for the same for Ksh.5,000/-.Case/Death summary from St. Peter’s Orthopedic & Surgical Speciality Center.Post-operative instruction from St. Peter’s Orthopedic & Surgical Speciality Center.Attendance card from from St. Peter’s Orthopedic & Surgical Speciality Center.
20. As per Dr. Okere’s medical report, the Appellant sustained the following injuries:Fracture of the right femur.Fracture of the right distal tibia.
21. The doctor stated in the report that he physically examined the Appellant and also relied on the above medical documents, noting that the Appellant was treated at St. Peter’s Orthopedic & Surgical Speciality Center with washout and debridement, femur nailing, tibia nailing. medication and physiotherapy.
22. At the time of examination, the Appellant complained of pain on the right leg, difficulty in walking and inability to perform heavy duties. The doctor noted that the Appellant was using crutches and that there were surgical scars on the upper leg and lower leg. The implants were still in situ.
23. In his opinion and prognosis, Dr. Okere classified the injuries as grievous harm. He estimated that it would cost the Appellant about Ksh.500,000/- to have the implants removed. The doctor assessed the degree of permanent incapacity of the right leg at 50%.
24. For the above injuries, the Appellant proposed an award of Ksh.2,000,000/- and relied on the case of *Ziporrah Nangila v Eldoret Express Limited & 2 others* [2016] eKLR in which the High Court on 21<sup>st</sup> July, 2016 made an award of Ksh.2,400,000/- under the head of general damages for pain, suffering and loss of amenities to a party who had sustained bilateral leg injuries, right wrist injury, fracture



- dislocation of the right ankle, comminuted compound fracture of the distal and fibular, fracture of the left distal tibia and fibula and extensive skin loss with bones exposed in the right tibia and whose treatment included emergency surgical toilet, debridement of the right ankle, external fixation used to mobilise the foot ankle and fixation of the fragments with inter-fragmentary screw.
25. Looking at the authority of Ziporrah Nagila (*supra*) that was relied upon by the Appellant, there is no doubt that the same related to injuries that were much more severe than those that the Appellant herein sustained. The authority was therefore not a suitable guide to the trial court.
  26. The Appellant also relied on the High Court judgement of Geoffrey Mwaniki Mwinzi v Ibero (K) Limited & another [2014] eKLR that was delivered on 30<sup>th</sup> July, 2014 in which the court made an award of Ksh.2,000,000/- in general damages for pain, suffering and loss of amenities to a party that sustained injuries that included extensive compound fractures of the left tibia and fibula, extensive damage to the soft tissues of the left leg and a fractured collar bone and whose treatment included initial internal fixation of the fracture with a metallic plate and subsequent amputation of the left lower limb above the knee.
  27. Again, one can see that the injuries in the authority on Geoffrey Mwaniki Mwinzi (*supra*) that the Appellant relied upon were of a much more severe nature than those that the Appellant sustained and even included an amputation of one lower limb. Again, the authority would not aptly guide the court in assessing general damages for pain, suffering and loss of amenities.
  28. On his part, the Respondent submitted before the trial court that an award of Ksh.850,000/- would sufficiently recompense the Appellant for the injuries that he sustained. He relied on the authority of Erick Mwiriki & another v Peter Kariuki Wanjiru [2020] eKLR in which the High Court on 25<sup>th</sup> June, 2020 varied the lower court's award to Ksh.800,000/- for a party who had sustained a fracture of the femur, fracture of the distal end of the right tibia and severe soft tissue injuries of the left thigh and right ankle joint. My view is that the authority relied upon is useful as the injuries were fairly comparable to those that the Appellant sustained.
  29. The Respondent also relied on the decision of the High Court rendered on 11<sup>th</sup> December, 2019 in David Mutembei v Maurice Ochieng Odoyo [2019] eKLR where for a fracture of the right femur and a proximal fracture of the left tibia, the award made under the head of pain, suffering and loss of amenities was Ksh.900,000/-. The decision is relevant as in relates to injuries that are fairly comparable to those suffered by the Appellant.
  30. The third authority that the Respondent placed his reliance upon is that of James Okongo v Elmat Sagwe Ogega [2021] eKLR in which in a judgement rendered on 27<sup>th</sup> May, 2021, the High Court made an award in general damages of Ksh.900,000/- in a case where the party sustained a fracture of the right tibia and fibula, fracture of the right femur, bruises on the face and a blunt trauma to the chest. Again, I find the authority relevant as the injuries are comparable to those that the Appellant herein sustained.
  31. The learned trial Magistrate did not address the Appellant's claim for loss of past, present and future earnings.
  32. Having considered the Memorandum and Record of Appeal, the submissions filed by the parties and the trial court record, I deduce the issues to be determined in this appeal to be as follows:
    - a. Whether the learned trial Magistrate erred in law and in fact and acted upon wrong principles of law in assessing general damages for pain, suffering and loss of amenities and/or made an award that was so extremely low as to make the award an entirely erroneous estimate of the damages to which the Appellant was entitled.



- b. Whether the learned trial Magistrate erred in law and in fact in failing to address the claim for loss of past, present and future earnings and whether the Appellant was entitled to damages under the said head and to what extent.
33. Compensatory damages are awarded to a wronged party in exercise of the court's discretion. The principles upon which an appellate court can interfere with judicial discretion were laid down in the case of *Price & another v Hidler* [1996] KLR 95 as follows:
- “The court will not interfere with the exercise of discretion by an inferior court unless its satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”
34. Further, in the case of *Gitobu Imanyara* (supra) the Court of Appeal while discussing the principles upon which an appellate court may disturb an award of damages by an inferior court held that:
- “...it is firmly established that this Court will be disinclined to disturb the finding of a trial Judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial Judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. This is the principle enunciated in *Rook v Rairrie* [1941] 1 All ER 297.
- It was echoed with approval by this Court in *Butt v Khan* [1981] KLR 349 when it held as per Law, J.A that:
- “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 either inordinately high or low.”
35. There is also the authority of *Mbogo & Another v Shah* [1969] EA 93, where it was held, inter alia, that:
- “An appellate court will interfere if the exercise of the discretion is clearly wrong because the judge has misdirected himself or acted on matters which he should not have acted upon or failed to take into consideration matters which it should be taken into consideration and in doing so arrived at a wrong conclusion. It is trite law that an appellate court should not interfere with the exercise of the discretion of a judge unless satisfied that the judge in exercising his discretion has misdirected himself and has been clearly wrong in the exercise of the discretion and that as a result there has been injustice.”
36. Having the above in mind, the question that then abounds from the first issue is whether learned trial Magistrate erred in law and in fact and acted upon wrong principles of law in assessing general damages for pain, suffering and loss of amenities and/or made an award that was so extremely low as to make the award an entirely erroneous estimate of the damages to which the Appellant was entitled.
37. It is instructive from the three decisions that the trial court relied upon that the same were rendered in the years 2020, 2019 and 2021 respectively. It is my view that the trial court in assessing damages while relying on past court determinations or authorities (in this case those relied upon by the Respondent)



- ought to go further and consider the period of time that has elapsed between the time those decisions were rendered and the time the lower court does its assessment. In the matter before the trial court, a period averaging about three years had lapsed since the pronouncements in the decisions were made.
38. The court should also have taken into account the factor of inflation and the fact that there was resultant 50% permanent incapacity on the Appellant's right leg. Those were material factors that were relevant in my view, which the trial court did not consider.
  39. That said, I am of the view then that as the trial court did not consider those material factors, the learned trial Magistrate effectively erred by failing to take into consideration matters which it ought to have considered. On that basis, I will, albeit minimally interfere with the trial court's discretion and assess general damages for pain, suffering and loss of amenities for the injuries that the Appellant sustained at Ksh.1,200,000/- after considering those factors.
  40. The second issue that the Appellant raised in the appeal through his submissions was that the learned trial Magistrate fell into error in failing address the claim for loss of past, present and future earnings and to assess and make an award under that head in favour of the Appellant.
  41. With regard to this claim, the Appellant pleaded that before the accident, he worked as a bodaboda rider and would earn Ksh.30,000/- monthly but could not continue working as such, having been rendered incapacitated following the accident. He reiterated that position in his evidence – that he worked as a bodaboda rider before being rendered unable to work by the accident. The Appellant did not produce any proof of earnings.
  42. The law relating to loss of future earnings is that the same falls in the category of special damages, which must not only be specifically pleaded but also strictly proved (see *Hussein v Hakika Transport Services Limited & another (Civil Appeal 42 of 2022)* [2023] KEHC 24903 (KLR) (27 October 2023) (Judgment); *Trundell v EWK (Minor suing through mother and next friend WK) (Civil Appeal E57 of 2021)* [2023] KEHC 25275 (KLR) (7 November 2023) (Judgment); and *Kenya Power & Lighting Co. Limited v Tuva (Civil Appeal E289 of 2022)* [2024] KEHC 3335 (KLR) (Civ) (5 April 2024) (Judgment).
  43. Where a party does not present evidence of a real actual loss, then a claim for loss of future earnings fails as the same is then not strictly proved as is the requirement in law. A court can only order compensation for loss of future earnings where the party claiming proves the real assessable loss by way of evidence.
  44. The claim for loss of future earnings is different from that of loss of earning capacity which is one in which the court awards general damages of a global amount. Loss of earning capacity results in a case where the injured party's earning capacity is diminished. A party who proves diminution of earning capacity may be compensated by an award in general damages of a global nature.
  45. Said in another way, general damages under loss of earning capacity are awarded where it is proved that owing to the injury suffered by the party claiming the same, his chances of getting a job in the labour market are diminished or lessened.
  46. It is apparent that although the Appellant pleaded under the head of loss of future earnings (which he fashioned as "loss of past, present and future earnings"), he mixed up the said claim with that of loss of earning capacity in his submissions, yet the latter was not pleaded.
  47. Be that as it may, as there is no evidentiary material to strictly prove the special damages claim under the head of loss of future earnings the claim was not sustainable. Effectively then, although the learned trial Magistrate erred by not addressing the claim for loss of past, present and future earnings, which as



stated above I have deemed to be a claim for loss of future earnings, the same would not have succeeded in any event as the same was not proved and was therefore for dismissal.

48. Being of the foregoing findings, I will allow the appeal only to the extent that I set aside the award of Ksh.850,000/- made by the learned trial Magistrate in favour of the Appellant and against the Respondent under the head of general damages for pain, suffering and loss of amenities and substitute the same with an award of Ksh.1,200,000/-.
49. Section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya dictates that costs ought to follow the event. Noting that the appeal is only partly successful, I order that each party shall bear their own costs of the appeal.

**DELIVERED (VIRTUALLY), DATED & SIGNED THIS 4<sup>TH</sup> DAY OF DECEMBER, 2024.**

**JOE M. OMIDO**

**JUDGE**

For The Appellant: Mr. Kulecho.

For The Respondent: Ms. Odero.

Court Assistant: Ms. Njoroge.

Ms. Odero: I pray for 30 days stay of execution.

Mr. Kulecho: No objection.

Court: There shall be stay of execution for 30 days.

**JOE M. OMIDO**

**JUDGE**

