REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

HIGH COURT CIVIL APPEAL NO. E001 OF 2022

EVON NG'ENDO WANJIRU .....

APPELLANT

VERSUS

STARSHINE BLUE INVESTMENT LIMITED ..... 1ST RESPONDENT

STEPHEN NJOROGE MWAI ..... 2ND RESPONDENT

(Being a*n appeal against the judgment dated 7th December, 2021, delivered vide Chief Magistrate's Civil Case No. 856 of 2019 at Naivasha by Hon. Esther Mburu, Senior Resident Magistrate)*

JUDGMENT

1. By a plaint dated 2nd December 2019, the plaintiff (herein "the appellant") sued the defendants (herein

"the respondents") seeking for judgment against the respondents for orders: -

a) *General damages,*

b) *Damages for loss/diminished earning capacity;*

c) *Cost of future medical treatment of Kshs 1,000,000*

d) *Special damages of Kshs 2,381,003.00*

e) *Costs of the suit,*

f) *Interest on (a) to (e) above*

2. The plaintiff's case is that on or about 14th June 2018, she was lawfully traveling as a passenger in a motor vehicle registration number KCP 780Z owned by the 1st respondent and driven by the 2nd respondent. That when the vehicle reached Karai area along Naivasha-Nairobi road, the 2nd respondent negligently drove the said motor vehicle causing it to be involved in an accident whereby she sustained serious injuries.

3. The injuries the appellant sustained are tabulated at paragraph 6 of the plaint as:

    a) *Extensive skin and muscle loss on the left arm (degloving injury)*

    b) *Compound (open) fracture of the left humerus*

    c) *Abrasions on the face*

    d) *Abrasions on the front part of the chest*

4. The appellant avers that the injuries have caused her a permanent incapacity of 68% and that he requires further surgery at an estimated cost of Kshs. 1,000,000.00. She further tabulates particulars of special damages as: -

    a) Copy of records – Kshs. 550.00

    b) Medical report – Kshs. 2,500.00

    c) Transport services – Kshs. 25,000.00

    d) Medical expenses – Kshs. 2,352,953.00

    e) Total amount -----Kshs. 2,381,003.00

5. However, the appellant's suit was opposed by the respondents vide respondents a statement of defence dated 7th February 2020. Wherein the respondents denied being the registered owners of the subject motor vehicle and/or that it was being driven by the 2nd respondent on the material date. The occurrence of the accident and the particulars of negligence attributed to the 2nd respondent were denied.
6. However, the respondents aver at paragraph 7 of the statement of defence that on without prejudice basis, if the accident ever occurred at all, which is denied, then the same was either solely caused by or substantially contributed to the appellant. The particulars of negligence attributed to the appellant are stated at paragraph 7 of the defence. The respondents prayed the appellant's suit be dismissed with costs.

7. However, before the case was fully heard, on 6th July 2021, the parties entered into a consent judgment on liability in the ratio of 80:20% in favor of the appellant as against the respondents. On the 12th October 2021, the parties recorded a further consent on special damages in favor of the appellant in the sum of Kshs 295,657 with the rider that the special damages should not be subjected to apportionment of the liability early recorded.
8. The matter then proceeded on assessment on quantum in particular general damages, loss or diminished earning capacity and future medical expenses plus costs of the suit.
9. The parties were directed to file submissions on quantum and by a judgment dated 7th December 2021, the trial court entered judgment in favour of the appellant as against the respondents as follows: -

a) Liability 80:20 in favour of the appellant as against the respondents,

b) General damages---------- Kshs 800,000.

c) Diminishing earning capacity------- Kshs 500,000.

d) Future medical expenses----------Kshs 200,000.

e) Less 20 percent ----------Kshs 300,000

f) Special damages ----------Kshs 295,657

g) Balance----------Kshs 1, 495,657.

10. However, the appellant is aggrieved by the decision of the trial court and appeals against it on the following grounds verbatim reproduced: -

a) That the Learned Trial Magistrate erred in law and in fact when she awarded Kshs. 800,000/= as

general damages, an amount which is inordinately low and represents an entirely erroneous estimate of general damages considering the injuries suffered by the Appellant.

b) *That the Learned Trial Magistrate erred in law and in fact when she failed to appreciate the seriousness of the injuries sustained by the Appellant as contained in the medical reports of Dr. W.M. Wokabi dated 29th August 2019 and Dr. Wambugu P.M. dated 24th October 2019 which estimated permanent incapacity at 68% and 67% respectively.*

c) *That the Learned Trial Magistrate erred in law and in fact when she failed to consider the testimony of the Appellant regarding the extent and seriousness of her injuries.*

d) *That the Learned Trial Magistrate erred in law and fact in making an award on quantum of general*

damages which was not comparable to awards made by courts for similar injuries.

e) *That the learned Trial Magistrate by awarding Kshs. 200,000/= as future medical expenses, erred in law and in fact by giving little or no weight to the medical report of Dr. W.M. Wokabi dated 29th August 2019 with respect to future medical expenses which he had estimated at Kshs. 1,000,000/=.*

f) *That the Learned Trial Magistrate erred in law and in fact when she gave too much weight to the medical report of Dr. Wambugu P.M. dated 24th October 2019 dated 29th August 2019, with respect to future medical expenses which he had estimated at Kshs. 200,000/=.*

g) *That the Learned Trial Magistrate erred in law and in fact when she failed to consider the evidence of the Appellant regarding the history of her*

treatment before making her determination on future medical expenses.

h) *That the Learned Trial Magistrate erred in law and in fact when she awarded Kshs. 500,000/= being diminished earning capacity, an amount which is inordinately low considering the extent of the injuries, permanent incapacity and profession of the Appellant.*

i) *That the Learned Trial Magistrate erred in law and in fact in failing to take into account the Appellant's submissions while making the award on quantum of damages*

j) *That the Learned Trial Magistrate erred in law and fact in not following the correct and proper legal principles and thereby arriving at a bad decision.*

11. As a result, thereof the appellant prays that; -

a) *That this court be pleased to set aside the award of general damages and to make a fresh assessment thereof.*

b) *That this court be pleased to set aside the award of future medical expenses and to make a fresh assessment thereof.*

c) *That this court be pleased to set aside the award of diminished earning capacity and to make a fresh assessment thereof.*

d) *Costs of this appeal and the lower court be awarded to the Appellant.*

12. The appeal was canvassed through filing of submissions and by submissions dated 29th May 2024, the appellant cited the case of *Paul Kipsang Koech & Another v Titus Osule Osore [2013] eKLR*, where the Court of Appeal discussed the circumstances under which an appellate court may interference with an

award by the trial court. That the trial court acted on wrong principles or failed to consider material factors.

13. The appellant submitted that the trial court erred in awarding Kshs. 800,000 as general damages as it is manifestly low given the extent of disability and disfigurement sustained being; extensive skin and muscle loss on the left arm, compound fracture of the left humerus, abrasions on the face and chest and permanent disfigurement of both legs as per the medical evidence produced by Mr. W. M. Wokabi and confirmed by Dr. Wambugu who testified on behalf of the respondent. Further, that Mr. W.M. Wokabi, assessed respondent's permanent disability at 68% while Dr. Wambugu assessed it disability 67%.

14. That the court has an obligation to give adequate compensation for damages as stated in the case(s) of, *Civicon Ltd v Richard Njomo Omwancha & 2 others [2019] eKLR, Njugu Consolidated Co. Ltd & Another v*

Lineth Chemutai Moritim [2019] eKLR and *Easy Coach Ltd v Emily Nyangasi [2017] eKLR.*

15. That in the trial court, the respondent proposed an award of Kshs. 3,000,000 as general damages and relied on the following cases: -

    a) *Umoja Rubber Products Ltd v Bobson Rimba Lewa [2015] eKLR* where the claimant suffered amputation of the left hand below the elbow with the High Court upholding the award of Kshs. 2,200,000 as general damages.

    b) *George Ragoka Ogola v Attorney General [2008] eKLR* where the plaintiff was amputated on the right hand below the elbow with the High Cout awarding Kshs. 2,000,000 as general damages for pain, suffering and loss of amenities

16. That the trial court ignored the appellant's submissions and legal authorities and held that the authorities cited by the respondent were reasonable.

The appellant submits that the subject finding of the trial court is erroneous and misleading as neither the injuries nor the degree of disability in the precedents cited by the respondent are similar to the injuries she sustained. Furthermore, that the respondent's cited authorities were decided long ago and the awards therein do not reflect the current rate of inflation.

17. The appellant referred the court to the case of; *Mbaka Nguru & Another v James George Rakwar [1998] eKLR*, where the court cautioned against mechanical awards and underscored the need for judicial awareness of inflation and economic conditions.

18. On the issue of future medical expenses, the appellant relied on the case of; *Tracom Ltd & Another v Hassan Mohamed Adan [2009] eKLR* where the Court of Appeal held that once future medical expenses are pleaded and proved, they should be awarded.

19. The appellant further submitted that in awarding future medical expenses, the trial court ignored the evidence of Mr. Wokabi who recommended future surgery at a cost of Kshs. 1,000,000 and instead awarded Kshs. 200,000 as estimated by the respondent without any justification.
20. That furthermore, the trial court did not give sufficient weight to her medical history that she had been treated at AIC Kijabe Mission Hospital for over two and a half months, had become accustomed to the doctors attending to her, and it was therefore her expectation that the surgery would be performed there.
21. The appellant consequently prays that the appeal be allowed, the judgment set aside, and substituted with an award of Kshs. 3,000,000 as general damages and Kshs. 1,000,000 for future medical expenses, together with costs of the appeal.

22. However, the respondents in submissions dated 30th May 2024, argued that the appellant was guilty of approbating and reprobating. That the appellant's Advocates through a letter dated 14th December 2021, demanded payment of Kshs. 1,706,737 which include damages and costs of the suit.

23. That, the respondents' insurer paid the amount in full through two (2) cheques dated 11th January 2022 for Kshs. 950,000 and Kshs. 756,737 which were received by the appellant's Advocates on 13th January 2022, without any reservation.

24. That the court cannot to allow the appellant to use the appellate process as a means to seek further sums having received full payment, taking into consideration that the court under Order 42 Rule 32 of the Civil Procedure Rules is empowered to reduce damages awarded by the trial court even in the absence of a cross-appeal.

25. That the appellant being guilty of approbating and reprobating, the appeal should be dismissed with costs as held by Court of Appeal in the case(s) of *Dr. Sunny Samuel v Simon M. Mbwika & another [1998] eKLR* and *Premier Food Industries Limited v Public Health Prosecutor - Kisumu [2021] eKLR.*
26. On quantum, the respondents submitted that the sum of Kshs. 800,000 awarded by the trial Magistrate was fully justified. That the court in reaching the award fully appreciated and considered all the evidence tendered including the supporting documents produced by the appellant and the medical reports by Mr. Wokabi and Dr. Wambugu which assessed appellant's permanent disability at 68% and 67% respectively before reaching her decision.
27. The respondents argued that the trial Magistrate considered the submissions of the appellant and the authorities relied on therein and distinguished them

having found that the injuries therein were more severe than the injuries the appellant had sustained.

28. That on the respondent's part, they relied on relevant and current authorities as follows: -

    a) *Florence Njoki Mwangi v Peter Chege Mbitiru [2014] eKLR* where the appellant suffered broken femurs bilaterally, two degloving injuries of the right knee and the right ankle and the High Court upheld the award of Kshs. 700,000 as general damages.

    b) *Benuel Bosire v Lydia Kemunto Mokora [2019] eKLR* the respondent sustained a single compound fracture for which disability had been assessed at 40% as a result of mal-union and serious soft tissue injuries and the High Court awarded Kshs. 700,000 as general damages.

29. The respondents submitted that the mere fact another court may have arrived at a different award

of general damages does not invalidate the award by the trial court and relied on the cases of; *Ken Odondi & two others vs James Okoth Omburah t/a Okoth Omburah & Company Advocates [2013] eKLR* as cited *Omar Athumani Mohammed t/a Paint Work and General Maintenance v Jumwa Kaingu [2021] eKLR*

30. The respondents finally submitted that the appellant having been fully paid the decretal sum and the trial Magistrate having exercised her discretion judicially, the appeal lacks merit and should be dismissed with costs.

31. At the conclusion of the hearing of the appeal, I note that the role of the 1st appellate court as stated by the Court of Appeal in the case of; *Selle & Another v Associated Motor Boat Co. Ltd. & Others (1968) EA 123*, is to re-evaluate the evidence afresh and arrive at its own conclusion.

32. Pursuant to the aforesaid, I note that as regard the argument that the appellant is approbating and reprobating, the evidence reveals that, judgment of the trial court was delivered on 7th December 2021 and seven days thereafter by a letter dated 14th December 2021, the appellant's law firm demand for payment of the decretal sum.
33. The demand letter indicates that the sum of Kshs 1,706,737.00 includes Kshs 800,000 awarded as general damages, Kshs 500,000 awarded for diminished earning capacity and Kshs 200,000 as future medical expenses.
34. On 13th January 2021 the respondents' law firm forwarded to the appellant's law firm two cheques No. 360989 for Kshs 756,737 and No. 360988 for Kshs 950,000. The letter indicates that, the payment was made in full and final payment of the matters. Further enclosed therewith was a consent to be signed to

mark the matter settled. The appellant was to sign and return the same.

35. At this point, two questions arise as to whether the consent was ever signed and returned to the respondents and whether the payment was received and if so, whether it was received on a without prejudice basis. Whatever the case the respondents submits that the payment was received and confirmed and thereafter the appellant filed an appeal.

36. Now let us consider when the appeal was filed. As already stated, the judgment in the trial court was on 7th December 2021. The memorandum of appeal herein is dated 6th January 2022. It suffices to note that, by that time the appellant had already made a demand on 14th December 2021, for payment of the decretal sum.

37. Be that, as it were, according to the respondents the memorandum of appeal was not served upon them until the 3rd day of February 2022, after the appellant had received full payment.

38. The key question is: Is the appellant approbating and reprobating.

    It is noteworthy that, even after the respondents filed their submissions on 14th February 2023 and submitted extensively on this issue of approbating and reprobating and supporting it with documents the appellant did not file any further or response submissions.

39. In relation to that issue, in the case of: *Dr. Sunny Samuel v Simon M. Mbwika & another [1998] eKLR*, the Court of Appeal declined to allow an application seeking for extension of time to file an appeal out of time on the grounds that he had been paid the decretal amount in full. The court stated as follows: -

40. "I have given most anxious consideration to this submission and the point raised. In my judgment, in the circumstances now obtaining, the applicant is precluded from attacking the judgment. He is no longer an aggrieved person.

41. Nor can he be allowed to approbate and reprobate the judgment at the same time. I am not persuaded that in the circumstances the applicant is entitled to proceed with his appeal.

42. In not too dissimilar circumstances, Mustafa JA (as he then was) delivering the first judgment of the Court of Appeal for East Africa in the case of Industrial and Commercial Development Corporation v Kariuki Gatheca 1977 KLR 52 was inclined to the view that the applicant had in effect affirmed and approbated the judgment, and had enjoyed and continued to enjoy the full benefit of it and would be precluded from attacking it. Law V-P,

agreed in every respect with the judgment prepared by Mustafa, JA and so did Musoke JA"

40. In the same vein in the case of; *Premier Food Industries Limited v Public Health Prosecutor – Kisumu [2021] eKLR* the court stated that: -

"29. Secondly, I note that the Applicant had already received payment of the taxed costs. The said payment was made on the basis of the decision by the Taxing Officer, who had awarded the costs in the sum of Kshs 200,550/=.

30. Having received payment on the strength of the Ruling dated 16th September 2020, the Applicant was now seeking leave to challenge the very same Ruling. In effect, the Applicant was seeking to challenge the validity of the decision from which it has been conferred with a benefit, whilst at the same time retaining the said benefit.

31. In the case of Evans v Bartlam (1937) 2 ALL. E.R. 649, at page 652 Lord Russel of Killowen said;

"The doctrine of approbation and reprobation requires for its foundation, inconsistency of conduct, as where a man, having accepted a benefit given him by a judgement cannot allege the invalidity of the judgement which conferred the benefit."

32. It is well settled that the court cannot approve an attitude in which a party approbates and reprobates. For that reason, too, the application before me fails."

41. Similarly, the High Court in the case of *Lucas Adhola Olal v Patrick Mutua Nderitu [2017] eKLR* stated that: -

42 "The court notes that counsel for the appellant has not denied receiving the cheque. Infact, the submissions by the appellant are very silent on that issue. In the circumstances, the conclusion

that this court would make is that the decretal sum was indeed paid. The respondent's letter dated 24th January, 2011 is very clear that the same was paid in full and final settlement.

43 The fact that the appellant's advocate accepted the cheque and went ahead to encash the same, implies that they received it on the same terms that it was forwarded by the respondent and that was "in full and final settlement".

44 I wholly agree with the finding by Mutungi J. in the case of Laban Onono & another v Dan Owiti (supra) "that the subject matter of the appeal herein having been paid in full, even if it were to be heard, serves no purpose, and would be a waste of valuable judicial time. Having said that, I find and hold that the appeal herein is incompetent and the same is dismissed with costs to the respondent."

45 This court fully concurs with the afore decisions that once a party accepts full payment of the decretal sum as a final and full payment then they cannot be heard to aver that they are not satisfied with the judgment of the trial court from which they have fully drawn and enjoy a benefit.

46 Furthermore, it is a fact that, the reason why an aggrieved party files an appeal is because they are dissatisfied by the decision rendered by the trial court. If that be so, what does the conduct of an appellant who files an appeal after receiving full payment without reserving the right imply?

47 Moreover, when the respondent makes a payment in full and final settlement of the matter, and the appellant receives the same without indicating they will pursue the matter further, the respondent has a legitimate expectation to be released from litigation.

48 In the instant matter the appellant did not intimate that, she would be pursuing her right of appeal. And so as much as I can perceive from the record that she has an arguable appeal, her conduct of approbating and reprobating denies her an opportunity to be heard

49 In the given circumstances the appeal cannot be heard on merit. It is consequently disallowed and/or dismissed with costs to the respondents.

Dated delivered and signed this day 2nd day of September 2025.

GRACE L. NZIOKA

JUDGE

In the presence of:

Ms. Mwiri H/B for Mr. Mwaniki for the appellant

Ms. Gathara for the respondent

Ms. Hannah: court assistant