

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL E097 OF 2023

CHARLES MWAI MURIITHI.....

APPELLANT

VERSUS

ESTHER WAIRIMU MURIU.....

.....RESPONDENT

(Being an appeal from the judgement of Hon. P.N Maina, CM, dated 18th May 2023, in Murang'a civil case no. 247 of 2018)

JUDGEMENT

- 1.** The genesis of this appeal is a suit instituted by the respondent in the lower court against the appellant in which she sought general and special damages for injuries sustained in a road traffic accident whose occurrence she blamed on the negligence of the appellant.
- 2.** In her amended plaint filed on 13th May 2019, the respondent averred that on 29th January 2018, she was

travelling as a fare paying passenger in Motor Vehicle Reg. No. KCM 081G (the subject vehicle) along the Kenol- Thika road when the appellant negligently managed and or controlled the vehicle causing it to overturn as a result of which she sustained serious injuries.

- 3.** After a full trial, the learned trial magistrate delivered his judgement on 18th May 2023 and found the appellant 100% liable for the accident. He awarded the respondent damages as follows;

General damages for pain and suffering - Kshs. 1, 000, 000;

Future medical care - Kshs. 400,000 for future

Diminished Earning capacity - Kshs. 700,000

Special Damages - Kshs. 1, 349, 785.56

The respondent was also awarded costs of the suit and interests.

- 4.** Being dissatisfied with the trial court's findings on quantum, the appellant proffered an appeal to this court vide a Memorandum of Appeal dated 4th December, 2023.

5. In his memorandum of appeal, the appellant faulted the learned trial magistrate for making a decision on quantum which was in his view unjust and against the weight of evidence presented during the trial. He complained that the awards for general damages and diminished earning capacity were exorbitant and unmerited given the injuries sustained by the respondent; that the learned trial magistrate erred in both law and fact by failing to pay regard to his defence and authorities he cited to guide the court on appropriate determination on quantum.

He urged the court to allow the appeal, set aside the trial court's decision on quantum and proceed to make its own assessment of the damages payable to the respondent.

6. The appeal was prosecuted by way of written submissions. The appellant's submissions dated 31st January 2024 were filed on his behalf by advocates on record *M/S Kimondo Gachoka & Company Advocates* while those of the respondent dated 1st August, 2024 were filed by her advocates *M/S B.W Kamunge & Company Advocates*.

7. Briefly, in his written submissions, the appellant stated that the award of general damages in the sum of Kshs 1,000,000 for pain and suffering was inordinately high considering the injuries sustained by the respondent and comparable awards for similar injuries. He submitted that an award of KShs.500,000 would have been adequate compensation for the respondent's injuries. For this proposition, he relied on the following authorities:

(a) **Joseph Kimanthi Nzau v Johnson Macharia [2019] eKLR** where the Respondent sustained injuries to the head, chest and lower limb injuries. He had a hematoma of the scalp, chest and severe tenderness in the right chest and right hip. He also had a fracture on the skull, two ribs and on the clavicle bone. He further had severe tenderness in the right chest anteriorly with haematoma formation in the same region and tenderness on right hip. For these injuries, the court of appeal reduced the High Courts award of Kshs.1,000,000 to Kshs. 800,000.

(b) **Catherine Gatwiri v Peter Mwenda Karaai**

[20181 eKLR] where the court awarded Kshs. 500,000 for cut wound on the forehead, fracture of the left scapular, fracture of the left clavicle, fracture of 3 ribs and compound fracture of the tibia and fibula.

(c) **Blue Horizon Travel Co. Ltd vs Kenneth**

Njoroge [2020] eKLR where the court awarded the respondent Kshs.400,000 for cut wounds on the head and right forearm, bruising on both head and right forearm, fractured ribs LI-6 and R 11-12, right haemothorax, fracture dislocation of the right hip and z fracture dislocations of right shoulder joints.

8. Regarding the award for diminished earning capacity, the appellant contended that the award of Kshs. 700,000 was erroneous as the respondent did not demonstrate how the injuries she sustained made her loose business or made her incur losses or prevented her from working to earn a living; that she did not prove the amount of loss she had suffered or may suffer as a result of the injuries. It was therefore the

appellant's view that the award on this limb should be set aside.

9. On her part, the respondent in her submissions fully supported the trial court's decision asserting that the impugned award was made in the trial courts discretion based on the evidence and authorities placed before him. Relying on the authorities of **Peter Mburu Icharia V Priscila Njeri Icharia Civil Application No. 204 of 1998** and **Bashir Ahmed Khan Butt V Uwais Ahmed Khan (1982-88) 1KAR 1,** the appellant submitted that the exercise of judicial discretion should not be interfered with unless it was shown that it was exercised on wrong principles or that in making the decision, the trial court took into account irrelevant factors or that the decision was plainly wrong. The respondent urged this court to find that the appellant has failed to discharge his burden of impeaching the trial court's decision and dismiss the appeal with costs.

10. As this is a first appeal to this court, I am enjoined to exhaustively analyse and reconsider the evidence presented before the trial court to arrive at my own independent

conclusion on whether or not to support the trial court's findings bearing in mind that, unlike the trial court, I did not have the advantage of seeing or hearing the witnesses and give due allowance for that disadvantage - **See: Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR; Selle & Another V Associated Motor Boat Company & Others (1968) EA 123.**

- 11.** This being an appeal contesting the trial court's decision on quantum only, it is important to point out that the award of damages for personal injuries is at large and is dependent on a trial court's discretion. As a general rule, an appellate court should not interfere with the award unless it was satisfied that in arriving at its decision, the trial court applied wrong legal principles or misapprehended the evidence on record or took into account irrelevant factors and thereby arrived at an award that was so inordinately high or low as to represent an entirely erroneous estimate.

12. The above principle was succinctly captured by the Court of Appeal in **Catholic Diocese of Kisumu V Tete (2004)** **eKLR** in which the court stated as follows;

“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 or leaving out of account some relevant one or misapprehended the evidence and so arrived at a figure so inordinately high or low as to present an entirely erroneous estimate.”

13. It is settled law that in assessing damages for personal injuries, the general method of approach is that comparable injuries should be compensated by comparable awards but regard must be had to the fact that no two cases can be exactly similar- See: **Stanley Maore V Geoffrey Mwenda**

(2004) eKLR; David Kiprugut & Another V Peter Okebe

Pango (2007) KECA 368 (KLR);

14. In this case, the appellant has insisted that the learned trial magistrate erred in awarding the respondent Kshs. 1,000,000 as general damages which in his view was inordinately high considering the injuries the respondent had suffered.

15. It is not disputed that the respondent sustained the following injuries:

- i. Head injury (cerebral concussion) with loss of consciousness;
- ii. Injury to the chest causing fractures of five (5) ribs on the left side with pulmonary oedema and effusion;
- iii. Fracture of the right clavicle (collar bone).

16. These injuries were confirmed by the very comprehensive medical report authored by *Dr. N. H. Bhanji* dated 10th July 2018 who also testified as PW3, the P3 form and the discharge summary from the Outspan Hospital which confirmed PW2's and PW3's testimony that after the accident, PW2 (the respondent) was admitted at the Outspan Hospital from 29th January 2018 to 16th March 2018, a total

of 46 days, 18 of which were spent in the intensive care unit (ICU). According to *Dr. Bhanji*, part of PW2's treatment at the ICU included insertion of a chest tube into her left chest cavity to drain out fluid and she was thereafter placed on a respirator. She also underwent a surgical procedure to fix her fractured collar bone with a metal plate and screws.

17. Upon examining the respondent on 9th July 2018, *Dr. Bhanji* noted that the movement of her right shoulder joint was painful and restricted in all directions. She was still undergoing physiotherapy and as the movements were going to take a long time to regain their normal range, he advised her to be wearing arm support.

18. *Dr. Bhanji* in his medical report which was produced in evidence as *Exhibit 9* made a finding that as a result of the head injuries, the respondent had a 5% risk of developing epileptic fits in future. She had already developed two of the symptoms related to post -concussion syndrome namely, headaches and forgetfulness which symptoms were extremely incapacitating and take a long time to subside. She was likely to develop other related symptoms like lack of

concentration, insomnia, and spells of dizziness might also take a long time to subside.

19. The report also reveals that as a result of the treatment PW2 underwent at the ICU which included administration of considerable amounts of steroids to treat pulmonary oedema, the respondent had developed diabetes which if not effectively managed could shorten her life.

20. The appellant did not offer any evidence in support of his defence and

therefore, the respondent's evidence regarding the nature and extent of her injuries was not controverted by any evidence to the contrary.

21. In arriving at the contested award, the learned trial magistrate considered the parties written submissions, the injuries sustained by the respondent and authorities from superior courts on previous awards made for similar injuries which included the cases **Joseph Kimathi Nzau V Johnson Macharia (2019) eKLR, George Kinyanjui/a climax coaches & another versus Hassan Musa Agoi (2016)**

eKLR as well as those cited by the parties. It is clear from the judgement that the learned trial magistrate fully appreciated the principles applicable in the assessment of damages for personal injuries which he elaborately reproduced.

22. After my independent evaluation of the evidence on record, I find no reason to fault the learned trial magistrates award of Kshs1,000,000 as general damages for the respondent's pain and suffering. It is clear from *Dr. Bhanji* 's medical report that the respondent must have endured immense pain and suffering in the 46 days she was admitted at the Outspan Hospital. In the course of her treatment, she underwent several surgical procedures that must have caused her great pain. It is noteworthy that at the time she was examined by PW3 about seven months after the accident, she had not healed from the injuries. She was still in pain and walking with the support of a crutch. Although she did not suffer any permanent disability, she developed complications from the injuries such as

contracting diabetes and was at the risk of developing epileptic fits in future.

23. I have considered the authorities cited by the appellant in support of his submission that an award of Kshs.500,000 would have been sufficient compensation for the respondent. I note that the injuries sustained by the claimants in those authorities were not comparable to the injuries sustained by the respondent in this case. The injuries sustained by the respondent were different and much more severe than those suffered by the claimants in those authorities.

24. In arriving at his award, the learned trial magistrate was guided by previous awards made by this court for similar injuries. He relied on among others the case of ***Joseph Kimathi Nzau V Johnson Macharia (Supra)*** in which this court set aside an award of Kshs.450,000 and substituted it with an award of Kshs.800,000 for a claimant who had sustained a fracture of the skull, fracture on right clavicle, two fractured ribs and multiple soft tissue injuries.

25. In ***Bodi & another V Gatobu (Civil Appeal 484 of 2018)***

[2022] KEHC 12882 (KLR), this court on 25th July 2022 set aside an award of Kshs.1,000,000 and substituted it with an award of Kshs. 800,000 for a claimant who had sustained a fractured clavicle, five fractured ribs, right sided effusion, liver laceration, blunt injury on the left thigh and soft tissue injuries.

26. In view of the foregoing, I am satisfied that the learned trial magistrate properly exercised his discretion in making the impugned award. Taking into account the severity of the injuries sustained by the respondent and inflationary trends which the learned trial magistrate also considered, I find that the contested award amounted to fair and reasonable compensation for the respondent's pain and suffering. It was within the range of awards made for similar injuries and it cannot be said that it was either manifestly excessive or inordinately high as to warrant intervention by this court. The award is therefore upheld.

27. Turning now to the award of Kshs.700,000 as damages for diminished or loss of earning capacity, the appellant has

argued that this award was made in error and ought to be set aside as it was not supported by the evidence on record. The appellant claimed that the respondent did not demonstrate how the injuries she sustained had made her loose business or prevented her from working to earn a living; that the respondent did not indicate the estimated amount of loss she had suffered or was likely to suffer as a result of the injuries.

- 28.** The law is that a claim for diminished earning capacity is a general damage claim that need not be pleaded but must be proved on a balance of probabilities. The trial court when considering damages under this head referred to the case of **Mumias Sugar Company Limited versus Francis Wanalo [2007] KECA 485 (KLR)** in which the Court of Appeal enumerated the principles upon which the award is made as follows;

“...The award for loss of earning capacity can be made both when the plaintiff is employed at the time of the trial and even when he is not so employed. The justification for the

award when plaintiff is employed is to compensate the plaintiff for the risk that the disability has exposed him of either losing his job in future or in case he loses the job, his diminution of chances of getting an alternative job in the labour market while the justification for the award where the plaintiff is not employed at the date of trial, is to compensate the plaintiff for the risk that he will not get employment or suitable employment in future. Loss of earning capacity can be claimed and awarded as part of general damages for pain, suffering and loss of amenities or as a separate head of damages. The award can be a token one, modest or substantial depending on the circumstances of each case. There is no formula for assessing loss of earning capacity. Nevertheless, the Judge has to apply the correct principles and take the relevant factors into account in order to ascertain the real or approximate financial loss that the plaintiff has suffered as a result of disability.”

29.In this case, the respondent in her evidence claimed that prior to the accident, she was in the business of selling books which used to earn her Kshs.30,000 per month. She did not however produce any evidence to prove this claim. She testified that at the time of the trial, she had closed her business. She did not indicate when she closed her alleged business and whether the closure had anything to do with her capacity to run the business owing to her injuries. It is important to point out that PW3 did not make a finding after examining the respondent that her injuries would heal with any residual disability or that they had caused her any permanent disability.

30. The learned trial magistrate in his judgement appreciated all the above facts but still went ahead to find that the respondent had established her claim for damages for diminished earning capacity to the required legal standard. In my view, this was an error on the trial court's part as this finding was not supported by the evidence on record. Even assuming that the respondent was engaged in some type of

business prior to the accident, she failed to adduce evidence to prove on a balance of probabilities that her capacity to run the business in future or to earn a livelihood had been diminished as a result of the injuries she had sustained. It is my finding that the award of damages for diminished earning capacity was not merited and it is hereby set aside.

31. Given that the award of special damages was not contested, the damages now payable to the respondent are as follows: -

- i. General damages for pain and suffering - Kshs. 1,000,000;
- ii. Damages for future medical expenses - Kshs. 400,000;
- iii. Special damages - Kshs. 1, 349, 785.56

Total- Kshs. 2, 749, 785.56

32. As the appeal has been partially successful, I order that each party shall bear its own costs of the appeal but the appellant will bear the respondents costs in the lower court.

33. It is so ordered.

**DATED, SIGNED and DELIVERED at MURANGA this 15th day of
OCTOBER, 2025.**

HON. C. W. GITHUA

JUDGE

In the presence of:

Mr. Mwangi for the Respondent
Mr. Kabita holding brief for Mr. Njuguna for the appellant
M/s Susan Waiganjo, Court Assistant