Sinohydro Corporation v Muchiri (Civil Appeal E056 of 2024)
[2025] KEHC 16168 (KLR) (6 November 2025) (Judgment)

Neutral citation: [2025] KEHC 16168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E056 OF 2024

TW OUYA, J

NOVEMBER 6, 2025

BETWEEN

SINOHYDRO CORPORATION ..... APPELLANT

AND

MIRIAM WANGUI MUCHIRI ..... RESPONDENT

(Being an appeal against the judgment of the Hon. Joseph Were Senior Principal Magistrate delivered on the 15th day of January 2024 in Ruiru CMCC No. 1 of 2022)

JUDGMENT

1. The instant appeal was lodged vide a memorandum of appeal dated 20th March 2024 on grounds that:

    i. The learned magistrate erred in law and fact by failing to analyze the evidence on record thereby finding the appellant 100% liable against the weight of evidence thus denying the appellant substantive justice.

    ii. The learned trial magistrate erred in law and fact by failing to consider and make a finding on the doctrine of volenti non fit injuria as pleaded by the appellant, thereby holding the appellant liable when indeed the respondent voluntarily assumed risk which were well within her informed knowledge.

    iii. The learned magistrate erred both in law and in fact by failing to find that there was no credible evidence of an independent eye witness to collaborate the respondent's case.

    iv. The learned trial magistrate erred in fact and in law in failing to consider conventional awards in cases of similar nature thereby awarding exorbitant and inordinately high damages without regard to the laid don principles and without giving any legal basis for the sums awarded under the various heads.

v. The learned trial magistrate erred in law and in fact in assessing the claim for loss of earnings and proceeded to award the respondent the sum of Ksh, 627,000.00 contrary to the evidence on record and without comprehensive regard on the evidence on record in particular the medical report that indicated that the Respondent's injuries were not directly linked to the injuries occasioned while at the appellant's construction site.

vi. The learned magistrate erred in law and in fact in assessing the claim for loss of earnings in the absence of any documentary evidence alluding to the respondent's earnings.

vii. The learned trial magistrate erred in making awards under the various heads by failing to take into account that the general damages awarded to the plaintiff would be invested to earn interest. Had the learned magistrate borne that factor in mind, he would have awarded a lesser amount only under general damages.

viii. The learned magistrate failed to consider the evidence and the submissions filed by counsel for the appellant.

ix. The learned magistrate erred both in law and fact by awarding the Respondent a sum of Ksh. 1,227,000.00 as damages and loss of income which sum was manifestly excessive outside the confines of reasonableness compare to the cited authorities and not commensurate with the nature of the injuries and the general circumspect of the case

2. Reasons wherefore, the appellant prayed that the decision by the trial court be set aside.

3. The basis of the claim filed at the trial court was that on or about 6th February 2015, the Respondent was in Mutonya area at the bypass near Wisdom Academy when she heard a blast and moments later was shards of stones flying towards her. She was hit by stones and severely injured leading to her admission to Kenyatta National Hospital for more than one month. The blast had allegedly been occasioned by the Appellant who was digging a sewerage line using explosives. It was averred that the appellant had negligently used explosive material in a place with busy human traffic hence exposing people, especially, the plaintiff to great risk of injuries and damage.

4. The Respondent suffered injuries to wit:

i. Crush injury to the back causing fractures of the spinal process of T9/T10, T11, T12, L1, L2, L3 and L4 vertebrae with a healed fracture of the left trasverse process of L3

ii. Anterior superior end plate chip fracture of L1 is noted. Injuries on T9-12 & L1-4 vertebral bones with features of degenerative changes of the lumbar spine.

iii. Penetrating chest injury and hemothorax (collection of blood in the space between the chest wall & the lung cavity)

iv. Vascular injury of left kidney resulting to a nonfunctioning left kidney which is now small.

v. Injuries on the lower thoracic & lumbar spine. Fractures of two (2) ribs 9& 10 rib on right side.

5. Following the accident, the Respondent, who was 64 years old, lost her livelihood of hawking snacks where she was making Kshs. 700.00 per day. Therefore, she claimed special damages at Kshs. 80,504.00, loss of earnings and loss of future earnings capacity from the day of the accident and general damages for pain and suffering.

6. The Appellant denied the claim through its statement of defence dated 19th June 2017 and in the alternative pleaded contributory negligence in that the Respondent ignored the warning signs erected by the Defendant.

7. The matter proceeded to trial where Dr. Maina Ruga testified as PW1. He testified that he is a general practitioner in private practice and had examined the Respondent on 25th October 2019 and prepared a medical report. The Respondent had suffered severe harm from blunt injury by a heavy stone from an explosive blast site resulting in soft tissue injury with lacerations, bruises and swelling. She also suffered had injury in the left kidney and acute injury with loss of function of the left kidney. The injuries could be treated by bed rest and the medication would still heal without intervention.

8. The Respondent testified as PW2 and stated that prior to the accident she used to work at Matunga area near Wisdom school and had worked for 6 years. She blamed the appellant for the accident. She spent kshs. 80,500 on medical treatment and was thus seeking compensation from the date of the accident. She maintained that on the day of the accident, the appellant did not blow any whistle to warn the passers-by that they were about to blast the stones as they used to. She was the only one who got injured on the day of the accident. She clarified that the Appellant only paid for the initial treatment and not for all the medical expenses.

9. Dr. Washington Wokabi testified as DW1 on behalf of the Appellant. He testified that the fractures sustained by the Respondent would take longer to heal as she was 65 years at the time of the accident. The Respondent never suffered any permanent disability from the accident.

10. The trial court found the appellant 100% liable for the accident. On quantum, the Respondent proposed an award of Ksh. 1,500,000.00 while relying on the case of Anthony Peter Wainaina vs Jumba Patrick Oganda & 3 others [2021] eKLR. The Appellant on the other hand relied on Samuel Mburu N. Ngaari & 4 others v Wangiki Wangari & Another [2014] e KLR and proposed an award of Kshs. 150,000.00

11. Taking into account the injuries suffered by the Respondent, the trial court awarded Kshs. 600,000.00. On loss of earnings, the court awarded Kshs. 300.00 on a multiplier of 95 months thus totalling to Kshs.627,000.00. There was no award for loss of future earnings. Special damages were awarded as pleaded at Kshs.80,504.00

12. Dissatisfied and aggrieved by the decision of the court, the appellant lodged the instant appeal against liability and quantum.

13. The court directed that the appeal be disposed through written submissions.

14. The appellant submitted that the Respondent was negligent in that she was well aware of the blasting at the appellant's construction site but failed to take precaution. Therefore, she voluntarily assumed risk and should shoulder liability for the injury under the doctrine of volenti non fit injuria.

15. On quantum, the appellant submitted that the award for general damages was excessive and not within consistent limits. Therefore, taking into account the injuries sustained by the Respondent (soft tissue injuries), an award of Ksh. 150,000.00 would have been sufficient. See Mulwa & another v Nzai [Civil Appeal E072 of 2023] [2024] KEHC 6898 (KLR)10 June 2024.

16. On loss of income, it was submitted that the trial court's finding was erroneous in the absence of documentary evidence alluding to the respondent's earnings. The trial court thus erred in considering evidence that was not on record. See Cecilia Mwangi & Another v Ruth Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR

17. The claim on special damages ought to have failed as the same was shouldered by the Appellant as admitted by the Respondent in cross examination.

18. Relying on Donghue v Stevenson, the Respondent submitted that the appellant owed a duty of care to persons who might have been affected by their actions of blasting. The appellant was therefore 100% liable for failing to uphold the duty of care.

19. On quantum, it was submitted that the award of Ksh. 600,000.00 was not excessive as demonstrated by Wendy Martin V Ngwesi CO. Ltd & 2 others [NBI HCCC NO. 513 OF 2003] and Mohammed Aden Abdi v Abdi N. Omar & Another [2005] eKLR.

20. On loss of earnings, it was submitted that even without proof of earnings, it was possible to revert to the regulations of wages to ascertain income as was in the case of Nyamira Tea Farmers Sacco v Wilfred Nyambati Keraita & Anor C.A NO. 68 of 2005 [2011] eKLR.

21. Special damages were pleaded and proved to the required standard. Therefore, the Respondent prayed that the decision by the trial court be upheld.

22. I have perused the pleadings and record of the lower court, the judgement of the trial court as well as the submissions by the respective counsels for the parties. The issues for determination are:

    a) Whether the learned trial magistrate erred in apportioning 100% liability on the Appellant;

    b) Whether the learned magistrate awarded excessive general damages in view of the injuries sustained; and

    c) Whether the Respondent is entitled to an award of loss of earnings.

23. 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 ..."

24. The Appellant contends that liability was not proved to the required standard as there was no independent witness to corroborate the Respondent's testimony. Therefore, contributory negligence ought to be imputed on the Respondent under the doctrine of volenti non fit injuria.

25. As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the Evidence Act Cap 80, which provides:

"107.

    (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

26. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act, thus:

> "The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

27. The two sections carry forward the often-repeated evidential adage: "he who asserts must prove".

28. Despite there being no other independent witness, the trial court relied on the Respondent's version of events having found that the Appellant owed a duty of care to ensure that its operations did not adversely affect potential passers- by. Especially because the activity was undertaken near a road that was used by a number of people.

29. In the persuasive decision of Peter Kanithi Kimunya v Aden Guyo Haro [2014] KEHC 1547 (KLR), the court remarked that:

> "There being no eyewitness to this accident, the onus of proving how the accident occurred and how negligent the respondent was never shifted to the respondent and that is the purport of Section 107(1) of the Evidence Act. Similarly, if the defendant was alleging that it was the plaintiff to blame for the occurrence of the accident, then it was upon him to prove that fact. In my view, Sections 109 and 112 of the Evidence Act are not inconsistent with Section 107 thereof but compliment the latter on the adage "he who asserts must prove".

30. Although the Appellant pleaded contributory negligence against the Respondent, he did not prove the same. Nevertheless, I find no valid basis for apportioning liability against the respondent, in as much as I appreciate the fact that determination of liability in road accidents cases is not a scientific affair as Lord Reid put more graphically in Stapley Vs Gypsum Mines Ltd (2) (1953) AC 663 at pg 681 that:

> "To determine what caused an accident from the point of new legal liability is a most difficult task. If there is any valid logical or scientific theory of ..... It is quite irrelevant in this connection in a court of law this question must be decided as a properly instructed and reasonable jury would decide it ..." The question must be determined by applying common sense to the facts of each particular case... One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases, it is proper to regard two or more as having jointly caused the accident."

31. I note that the Respondent's assertion that the Appellant did not give any warning, as it often did, prior to blasting the quarry was not controverted in any way. The Appellant did not provide any evidence to demonstrate that it issued a signal to the members of the public prior to blasting the stones.

32. I find that the assertion by the Appellants that the Respondent ought to have known that the Appellant was about to blast the stones was not merited. Further, finding fault with the Respondent for being the only person injured by the blast goes contrary to the requirement of duty of care that mandates the Appellant to take all reasonable steps to ensure that persons likely to be affected by their actions are not adversely affected.

33. Flowing from the above, I concur with the trial court's finding on liability and find no reason to disturb it.

34. As to whether the learned magistrate awarded excessive general damages in view of the injuries sustained, 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.

35. In this case, the nature and extent of injuries was not in dispute, the issue is the level of compensation the Respondent was entitled to. General damages are damages at large and the court does the best it can in reaching an award that reflects the nature and gravity of the injuries. In assessing damages, the general method of approach should be that comparable injuries should as far as possible be compensated by comparable awards but it must be recalled that no two cases are exactly alike as the Court of Appeal observed in Simon Taveta v Mercy Mutitu Njeru CA Civil Appeal No. 26 of 2013 [2014] eKLR thus:

> "The context in which the compensation for the respondent must be evaluated is determined by the nature and extent of injuries and comparable awards made in the past."

36. The principles were further summarized by the Court of Appeal in Jabane v Olenja [1986] KLR 661 as follows:

> "The reported decisions of this court and its predecessors lay down the following points, among others, for the correct approach by his court to an award of damages by a trial judge.
>
> (1) Each case depends on its own facts;
>
> (2) awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes (the body politics);
>
> (3) comparable injuries should attract comparable awards.
>
> (4) inflation should be taken into account; and
>
> (5) unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave it alone."

37. According to the medical report, the Respondent sustained the following injuries:

i. crush injury to the back causing fractures of the spinal process of T9/T10, T11, T12, L1, L2, L3 and L4 vertebrae with a healed fracture of the left trasverse process of L3

ii. Anterior superior end plate chip fracture of L1 is noted. Injuries on T9-12 & L1-4 vertebral bones with features of degenerative changes of the lumbar spine.

iii. Penetrating chest injury and hemothorax (collection of blood in the space between the chest wall & the lung cavity)

iv. Vascular injury of left kidney resulting to a nonfunctioning left kidney which is now small.

v. Injuries on the lower thoracic & lumbar spine. Fractures of two (2) ribs 9& 10 rib on right side.

38. The Appellant relied on Mulwa & another v Nzai [2024] KEHC 6898 (KLR) to advance the position that an award of Kshs. 150,000.00 would be sufficient compensation considering the injuries sustained by the Respondent. I find that the injuries sustained by the Respondent are more serious than those sustained by the Plaintiff in the Mulwa case (supra).

39. Whereas I recognizing that the Respondent herein did not suffer any permanent incapacity, I note that she sustained multiple fractures that are almost comparable to the injuries in Jacaranda Bodaboda Operators v Nyasero [2023] KEHC 23806 eKLR where the Court awarded the Plaintiff General Damages for pain and suffering at Ksh. 750,000.00.

40. I am also guided by Cecilia W. Mwangi & Another V Ruth W. Mwangi [1997] KECA 62 (KLR) where the Court of Appeal substituted an award of Kshs. 960,000.00 with kshs. 350,000.00 for similar injuries.

41. In view of the above authorities, and taking into account inflation based on the Cecilia Mwangi case, I find that the award of Kshs. 600,000 for pain and suffering is adequate compensation for the injuries suffered. The award of the trial Court is therefore upheld.

42. This court will next determine whether the Respondent is entitled to an award of loss of earning. The Appellants faulted the trial Court for awarding the Respondent Kshs. 300,000.00 . The Appellant has faulted this award on the basis that it had not been proved to the required standard.

43. Upon perusing the record, I find that indeed the Respondent did not provide any evidence to demonstrate that she was engaged in any business prior to the accident. Even though she averred that she had been selling pea nuts by the road side, no witness was called to corroborate this assertion. Proof of earning is germane to an award of loss of earning. Whereas I recognize that proof need not be by contract of employment or pay slip, it is crucial that the requirements on standard of proof are adhered to.

44. While it is possible that the Respondent might have been involved in an economic activity prior to the accident, without proof of the nature of the economic activity, it is trite that loss of earning is part of special damages and must be strictly proved.

45. In Cecilia W. Mwangi and Another v Ruth W. Mwangi NYR CA Civil Appeal No. 251 of 1996 [1997] eKLR, the Court of Appeal drew the distinction between loss of earnings and loss of earning capacity as follows:

> "Loss of earnings is a special damage claim. It must be specifically pleaded and strictly proved. The damages under the head of "loss of earning capacity" can be classified as general damages but these have also to be proved on a balance of probability."

46. Therefore, I find that the trial magistrate erred in making an award for loss of earning as the same though pleaded was not proved to the required standard.

47. That being said, I noted that the Respondent stated both in her plaint and in her statement and testimony that she previously worked as a hawker of snacks and fruits around the scene where the accident occurred. She testified that she used to earn an average of kshs.700 per day which is no longer possible subsequent to the accident. This is evidence that was not disputed or countered.

48. For the above reason, I find that loss of earning capacity is an aspect that ought to have been factored in the general damages. This was exemplified in the case of Cecilia W. Mwangi (Supra). I therefore substitute the general damages award of Kshs 600,000 with an award of Kshs 900,00 having factored the aspect of loss of earnings capacity.

49. I find no reason to disturb the finding on special damages.

50. The upshot of the matter is that the appeal is disposed in the following terms:

    i. The finding of the trial court on liability is upheld

ii. General damages for pain and suffering and loss of earning capacity Kshs. 900,000.00

iii. The finding on loss of earning is hereby set aside

iv. The finding on special damages is upheld.

v. Each party to bear its costs.

51. Thirty (30) days stay of execution to apply.

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 6TH DAY OF NOVEMBER, 2025.

HON. T. W. OUYA

JUDGE