

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILLIMANI LAW COURTS
CIVIL APPEAL NO. E360 OF 2023

GILBERT NZAYWA SHIUNZA..... APPELLANT

VERSUS

WATU CREDIT LTD..... 1st RESPONDENT

FEDRICK WABALA MUKHOLI.....2nd RESPONDENT

(BEING AN APPEAL FROM THE JUDGMENT/DECREE ISSUED BY HON
IRENE IRUNGU (SPM) DATED 14th APRIL 2023 IN NAIROBI
MILLIMANI COMMERCIAL CMCC NO 13477 OF 2021)

BETWEEN

GILBERT

NZAYWA

SHIUNZA.....PLAINTIFF

VERSUS

CAR & GENERAL (TRADING) LTD.....1st

DEFENDANT

WATU CREDIT LTD.....2nd

DEFENDANT

J U D G M E N T

A. Introduction

- 1.** The Appellant filed a plaint dated 10th December 2021, where he sued the respondents as the beneficial owners of Motor cycle registration No **KMFQ 427S**. It was his contention that on the 3rd June 2021 he was lawfully and carefully pedal cycling along Kimbo-Kiganjo road, when the said motor cycle was carelessly and recklessly ridden that it was allowed to loss control and violently knocked him resulting in him sustaining severe bodily injuries, loss and damage. He thus sought for general damages, special damages of **Kshs 36,920.00**, future medical expenses amounting to **Kshs 150,000/=** and general damages from diminished hearing capacity in respect of injuries sustained in a road traffic accident which occurred on the 3rd June 2021.

- 2.** The respondents did file their joint statement of defence denying all the averments made in the contract, especially the particulars of negligence attributed to them and put the appellant to strict proof of the same.
- 3.** During trial PW1 PC Bob Lumumba from juja police station produced the police abstract and confirmed that the said accident did occur and was reported at their police station, though the matter was still pending under investigations as the motor cyclist rider had run away. The Appellant also testified explaining how the accident occurred and produced all his claim supporting documents. The respondents did not call any witness, but by consent had the second medical report of Dr Wambugu dated 9th August 2022 produced as part of their evidence.
- 4.** The trial court did consider all the evidence adduced and entered liability as against the respondent at 100% and further awarded damages as follows;

a) General damages - Kshs 700,000/=

- b) Loss of earning capacity-Nil
- c) Special damages-Kshs 36,920/=
- d) Future Medical expenses Kshs 150,000/=
- e) Costs and Interest of the suit

5. The Appellant, being dissatisfied with the quantum awarded, filed his memorandum of Appeal dated 10th May, 2023, raising four (4) grounds of appeal, namely:

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a) That the learned trial magistrate erred in law and in fact by awarding manifestly low damages to the Appellant on pain and suffering against evidence placed before the Honourable Magistrate

b) That the learned magistrate erred in law and in fact by failing to make an award for general damages for diminished earning capacity against evidence placed before the Honorable Magistrate.

c) The learned Magistrate erred in law and in fact by reaching at a conclusion on award of damages that is contrary to the evidence before him, the established principles on awarding of damages under

the fatal accidents Act and law reform Act and the appellants submissions.

d) In the circumstances of the case, the finding of the learned magistrate were characterized by misapplication of the law, misapprehension of facts of the case, consideration of irrelevant matters and wrong exercise of discretion.

6. The Appellant thus did pray that this Appeal be allowed, the judgment of the trial court on quantum be set aside, and the same be re-assessed and be re-apportioned appropriately. They also sought to be awarded the costs of this Appeal.

B. Analysis and Determination

7. I have considered this appeal, submissions, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being a first appeal, it is by way of a retrial, and this court, as the first appellate court, must re-evaluate, re-analyze, and re-consider the evidence afresh and

draw its conclusions on it. The court should, however, bear in mind that it did not see the witnesses as they testified and give due allowance for that. (see **Selle v Associated Motor Boat Co Ltd & Others [1968] EA 123**) & **Peters Vs Sunday Post Limited(1968) EA 123**

8. A first appellate court is also the final court of fact, and litigants are entitled to full, fair, independent consideration of the evidence. The parties have a right to be heard both on issues of fact and issues of law, and the court must address itself to all issues raised and give reasons thereof. While considering the entire scope of **section 78 of the Civil Procedure Act**, a court of first appeal can appreciate the entire evidence and come to a different conclusion. See **Kurian Chacko Vs Varkey Ouseph AIR 1969 Kerala 316**

9. The two issues that arise for determination in this Appeal is Whether the quantum awarded was manifestly low and secondly, whether the trial Magistrate erred in

not awarding the Appellant general damages for diminished hearing capacity.

10. On quantum, in **Woodruff Vs Dupont (1964) EA 404** it was held by the East African court of Appeal that;

“The question as to quantum is one of fact for the trial judge and the principles of the law enunciated in the decided cases are only guides. When those rules or principles are applied, however, it is essential to remember that in the end what has to be decided is a question of fact. Circumstances are so indefinitely various that, however carefully general rules are framed, they must be construed with some liberality and too rigidly applied. The court must be careful to see that the principles laid down are never so narrowly interpreted as to prevent a judge of a fact from doing justice between the parties. So to use them would be to misuse them.....”

The quantum of damages being a question of fact for the trial judge to determine, the sole question for determination in this Appeal is not whether he follows any particular rules or the orthodox method in computing the damages claimed by the plaintiff, but whether the damages awarded are, “such as may fairly and reasonably be considered as a rising according to the usual cause of things, from the breach of contract itself.” The plaintiff is not entitled to be compensated to such an extent as to place him in a better position than that in which he would have found himself had the contract been performed by the defendants.”

- 11.** the Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tete Civil Appeal No. 284 of 2001[2004] eKLR 55** set out circumstances under which an appellant court can interfere with an award of damages in the following terms: -

“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 in the first instance. The appellate court can justifiably interfere with quantum of damage's 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 factors 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 represent an entirely erroneous estimate".

12. I have carefully considered all the pleadings filed and evidence tendered in court, especially on the issue of injuries sustained by the appellant. The Appellant suffered a comminuted fracture of the left lower midshaft tibia and fibula, causing him to suffer a 30% permanent incapacity. The Appellant

provided medical documents to prove the said injuries, and the respondents doctor too affirmed the same

13. Indeed, based on the evidence tabled, it was proved that as a result of this accident, the Appellant sustained serious injuries and was therefore entitled to adequate compensation. The question that then arises is whether the award of damages of **Kshs 700,000/=** was adequate. In **West(H) and Sons Limited vs Shepherd [1964] AC 326 at 345,** it was appreciated that;-

“The purpose of compensation is not to remedy or recompense every injury, but must be a reasonable compensation in line with comparable. In order to interfere with the award of the lower Court, this court must be satisfied that the trial court did not exercise its discretion judiciously”.

- 14.** The Appellants' residual disability was assessed at 30% and comparable injury awards range between **Kshs 1,000,000/=** to **Kshs 1,500,000/=**. See *Joash M Nyabincha Vs Kenya Tea Development Authority & 2 others (2013) Eklr, Robert Mwaniki Ndigwa Vs Agatha Kaugi Riunga (2018) Eklr, and James Gathirwa Ndungi Vs Multiple Hauliers (EA) Ltd & Another (2015) eKLR*
- 15.** Having considered comparable awards and inflationary trends, I do find and hold that the trial court erred in awarding the Appellant **Kshs 700,000/=** as the same was unreasonable low to justify interference by this court. The said award is thus set aside and based on similar injury awards is increased **Kshs 1,500,000/=**.
- 16.** On the second issue, the Appellant also faulted the trial court for not awarding him damages for loss of earning capacity. On this issue, the court of Appeal, in the case of **MUMIAS SUGAR COMPANY LIMITED-VS-FRANCIS WANALO[2007]EKLR** observed that;

“...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.”

17. I am guided by the decision of **HON. Justice L.N Mugambi** in the case of **NYATOGO V MINI BAKERIES LIMITED (CIVIL APPEAL E38 OF 2021) [2023] KEHC 1593 (KLR) (10 MARCH) (JUDGEMENT)** where it was held as follows.

“.. Diminished earning capacity refers to decrease in a person’s earning ability as a result of the disability suffered. It is different from loss of earnings which looks at what has actually been lost as a result of the accident. Diminished earning capacity need not be specifically pleaded and proved but loss of earnings must be specifically pleaded and proved. Usually, loss of earning capacity is concerned with the effect of the injury on the person’s future earning ability as opposed to the present loss. However, it is the responsibility of the respondent to demonstrate, by way of

evidence, the effect that injury would have on his earnings in the future in order to get an award under that head.” (Also see; Paul Njoroge vs Abdu Saburi Sabonyo [2015] eKLR).

18. Considering these parameters and the evidence lead before the trial Magistrate, it is clear the Appellant did not demonstrate by way of evidence, the effects that the injury had on his future earning and the trial Magistrate cannot be faulted for not awarding him the same.

C. Disposition

19. This Appeal therefore partially succeeds. The award of general damages issued in **Millimani Commercial Court, CMCC No E13477 of 2021** is hereby set aside and substituted with an award of ***Kshs 1,500,000/=.***

20. The Appellant is awarded costs of this Appeal which is assessed at ***Kshs 175,000/=*** all inclusive

21. It is so ordered.

Dated, signed, and delivered in open court at
MARSABIT thisday of
DECEMBER, 2025.

**FRANCIS RAYOLA OLEL
JUDGE**

Delivered on the virtual platform, Team this ...2nd
.....day of **DECEMBER, 2025.**

In the presence of: -

.....N/A.....Appellant

.....N/A..... Respondent

.....JARSO.....Court Assistant