

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
CIVIL APPEAL NO. E275 OF 2024

**PETER WAHOME
WACHIRA..... APPELLANT**

VERSUS

**MURIITHI ERICK MURANGIRI.....
.....RESPONDENT**

**(Being an Appeal from the Judgment and Decree of Hon.
L. D. Ogombe (PM) delivered on 17th September 2024 in
Thika CMCC No. E373 of 2023)**

JUDGMENT

Brief facts

1. This appeal arises from the judgment of Thika Chief Magistrate in CMCC No. E373 of 2023 involving a claim for compensation of injuries sustained in a road traffic accident. The magistrate found the appellant 70% liable and awarded the respondent general damages of Kshs. 2,000,000/- as general damages, loss of earning capacity Kshs. 300,000/-, special damages of Kshs. 550/- plus costs.
2. Dissatisfied with the court's decision, the appellant lodged this appeal citing 4 grounds summarized as follows:-

- a) The learned trial magistrate erred in law and in fact in awarding damages of Kshs. 2,000,000/ which was excessive and erroneous considering the injuries sustained.
 - b) The learned trial magistrate erred in law and in fact in awarding loss of earnings that had not been proved or approved.
3. Parties put in written submissions to dispose of the appeal.

Appellant's Submissions

4. The appellant submits that the medical report by Dr. Muoki James opined that the respondent sustained permanent incapacitation at the rate of 40% whereas Dr. Wambugu assessed permanent incapacitation at 25%. The appellant thus argues that the award of Kshs. 2 million as general damages based on the injuries sustained by the respondent was inordinately high and erroneous for want of any legal backing or legal justification. The appellant further argues that the learned magistrate failed to apply any or proper legal principles in order to arrive at the sum given. Further the learned magistrate did not give due regard to comparable awards for similar or comparable injuries and thus the award ought to be re-assessed. The appellant refers to the case of **Pan African Paper Mills**

Limited vs Sylvester Nyarango Obwocha [2019]

eKLR where the respondent sustained soft tissue injury of the lower thoracic region, a compression fracture of the 11th thoracic vertebrae, back injury and the x-ray showed compressed fracture of T12. The court on appeal did not interfere with the award of Kshs. 400,000/-. In

Mumias Sugar Company Limited vs Mohammed

Kweyu Shaban [2018] eKLR, the court awarded Kshs. 800,000/- to the respondent who sustained a prolapse disc at L4/L5 which affected his lower limbs because of nerve compression. The appellant therefore submits that an award of Kshs. 800,000/- would be adequate as general damages for the injuries sustained by the respondent.

5. The appellant argues that from the record, the respondent deposited a total sum of Kshs. 114,603.30/- from Coffee Management Services which would be an average of a monthly sum of Kshs. 11,460/- for the period of ten months. Further that there is no evidence that the respondent paid tax as required by law. The appellant further argues that there is no legal basis for the claim of loss of earnings as both medical reports did not declare the respondent 100% incapacitated. Thus, the respondent can continue working in other income generating activities. Relying on the cases of **Butler vs Butler [1984] KLR 225** and **Catherine Gatwiri vs Peter Mwenda Karaai [2018] eKLR**, the appellant submits that the respondent has not proved the claim for loss of earnings.

The Respondent's Submissions

6. The respondent submits that he suffered the following injuries:-

a) Right rib fracture

b) Fracture of the thoracic spine at T4 and T5 vertebrae causing canal stenosis and spinal cord injury with paralysis of both lower limbs

c) Multiple bruises on the right leg

d) Pain and tenderness on the chest

e) He complains of pain on the back and requires assistance to walk.

7. The respondent submits that he produced the discharge summary from Kenyatta National and Referral Hospital, P3 Form and medical report by Dr. James Muoki to demonstrate the injuries he sustained. The respondent further testified that he has problems on his back and cannot walk without support. The respondent argues that the medical report by Dr. James Muoki dated 17/7/2023 indicated that he sustained the injuries as in the plaint and further observed that he suffers persistent pains, deformities and difficulties walking. Dr. Muoki concluded that he sustained grievous harm and assessed permanent

disability at 40%. The appellant referred him to a second medical examination with Dr. P. M. Wambugu and the report concurred with his pleaded injuries but assessed permanent disability at 25%.

8. The respondent submits that the trial magistrate considered the injuries pleaded and the medical assessments by each party's doctors and took an average of the permanent incapacity by both doctors settling at 32.5%. The honourable magistrate proceeded to analyse the authorities put forward by the parties and observed that

the appellant supplied two authorities for comparable injuries where the awards were 2 million and 8 million respectively. The trial court then sourced its own authorities and exercised discretion to award Kshs. 2million in general damages. Thus, the respondent argues that the trial magistrate has not displayed any error in judgment or applied any wrong principles when assessing general damages. Relying on the case of **Augustine Muriungi Mukindia vs Moffat Mwandiki [2019] eKLR**, the respondent argues that there is no basis for the court to interfere with the trial magistrate's findings and awards.

9. The respondent submits that he specifically pleaded for loss of earning capacity in his plaint. The respondent further submits that compensation under this head is payable for reduced earning capacity following an accident. The respondent submits that he argued at the

trial court that prior to the accident he was employed as a Communications Officer at Coffee Management Service earning a monthly income of Kshs. 25,000/-. He further produced a copy of his equity Bank Account records as proof. The appellant opposed his averments and argued that the median monthly earnings for the 10 months preceding the accident was Kshs. 11,460/-. The trial court was persuaded by the appellant and concluded that he earned Kshs. 11,460/- per month from his employment. The trial court was then guided by the case of **Kovi vs Obanga & 2 Others (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment)** where an accident victim who sustained 40% incapacity was awarded Kshs. 400,000/- for loss of

earning capacity and then proceeded to exercise its discretion and awarded him Kshs. 300,000/-.

Issues for determination.

10. The main issues for determination are:-
 - a) Whether the award of general damages was inordinately high.
 - b) Whether the award for loss of earning capacity is justified.

The Law

11. Being a first Appeal, the court relies on a number of principles as set out in **Selle and Another vs**

Associated Motor Boat Company Ltd & Others

[1968] 1EA 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 into account of particular circumstances or probabilities materially to estimate the evidence.”

12. In **Gitobu Imanyara & 2 Others vs 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 allowance in this respect.

13. Relying on the above cases, the appropriate standard of review to be established can be stated in three complementary principles:-

- a) That on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
- b) That in reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before it; and
- c) That it is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.

Whether the award of general damages was inordinately high.

14. The Court of Appeal in **Catholic Diocese of Kisumu vs Sophia Achieng Tele Civil Appeal No. 284 of 2001 [2004] 2 KLR 55** set out the circumstances under which an appellate 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 awarded different

figure if it had tried the case at first instance. The appellant 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 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.”

15. Similarly, in **Sheikh Mustaq Hassan vs Nathan Mwangi Kamau Transporters & 5 Others [1986] KLR 457** that:-

“The appellate court is only entitled to increase an award of damages by the High Court if it is so inordinately low that it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the Judge proceeded on a wrong principle or misapprehended the evidence in some material respect....A member of an appellate court when naturally and reasonably says to himself “what figure would I have made” and reaches his own figure must recall that it should be in line with recent ones in cases with similar circumstances and that other judges are entitled to their views or opinions so that their figures are not necessarily wrong if they are not the same as his own.”

16. According to the plaint, the respondent suffered the following injuries:-

a) Right rib fracture

b) Fracture of the thoracic spine at T4 and T5 vertebrates causing canal stenosis and spinal cord injury with paralysis of both limbs

c) Multiple bruises on the right leg

d) Pain and tenderness on the chest

17. The magistrate awarded a sum of Kshs. 2,000,000/- for general damages for pain and suffering. The appellant submits that the said award is manifestly excessive and is not justifiable in comparison to the injuries sustained by the respondent. The respondent submits that the award is justifiable and comparable to the injuries he sustained.

18. I have perused the record of appeal and noted that the injuries sustained by the respondent were confirmed by Dr. Muoki James K. in his medical report dated 17th July 2023. The doctor further classified the respondent's injuries as grievous harm and assessed permanent disability at 40%. Dr. P. M. Wambugu also confirmed the respondent's injuries in his medical report dated 1st February 2024. The doctor indicated that the respondent sustained skeletal, neural and soft tissue injuries from

which he had made adequate recovery and that the lower limb paralysis was gradually improving

with weakness on the left leg only. He further assessed permanent disability at 25%.

19. Looking at the decisions relied on by both parties, the decisions cited by the appellant, the injuries are less severe than those sustained by the respondent whereas the decisions cited by the respondent are fairly comparable in the circumstances.

20. The learned trial magistrate when arriving at the award of Kshs. 2,000,000/- considered the authorities cited by the parties and the cases of **Nyagoto vs Mini Bakeries Limited (Civil Appeal E38 of 2021) [2023] KEHC 1593 (KLR) (10 March 2023) (Judgment); Daniel Makau Mutinda vs Patrick Ngei Mutyetumo [2020] eKLR** and **William Kitoto Andere vs Easy Coach Limited [2019] eKLR**. The learned trial magistrate further considered the injuries suffered by the respondent.

21. Taking into consideration the severity of the respondent's injuries, the pain and anguish and the inflationary trends, it is my considered view that an award of Kshs. 2,000,000/- by the magistrate is not excessive. In my view the award is reasonable compensation for the injuries. I hereby uphold the said award as damages for pain, suffering and loss of amenities.

Whether the respondent was entitled to an award of loss of earning capacity

22. The Court of Appeal in **Butler vs Butler [1984] KLR 225** had this to say:-

A plaintiff's loss of earning capacity occurs where, as a result of his injury, his chances in the future of any work in the labour market or work, as well paid as before the accident, are lessened by his injury... It is a different head of damages from an actual loss of future earnings which can readily be proved at the time of the trial. The difference was explained in this way: compensation for loss of future earnings is awarded for real accessible loss proved by evidence. Compensation for demotion of earning capacity is awarded as part of general damages.

23. Similarly the Court of Appeal in **S. J. vs Francesco Di Nello & Another [2015] eKLR** held that:-

Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is

proved by evidence. On the other hand loss of earning capacity is compensated by an award in general damages, once proved.

This was the position enunciated in Fairley vs John Thomson Ltd [1973] 2 Llyod's Law Reports 40 at pg 14 wherein Lord Denning M.R. said in part as follows:-

It is important to realize that there is a difference between an award for loss of earning as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages. Learned Counsel for the respondent was therefore wrong in stating that loss of earning capacity was not pleaded and that it must be proved as though it were a claim under loss of income or future earnings.

24. Evidently, from the above cases, loss of earning capacity is awarded as part of general damages and need not be specifically pleaded nor proved as though it were a claim under loss of income or future earnings, but ought to be proved on a balance of probability.

25. The factors to be taken into account in considering such damages vary from case to case and they include

such factors as the age and qualifications of the claimant, his remaining length of working life, his disabilities and previous service if any. **Butler vs Butler [1984] KLR 225.**

26. I am well guided by the foregoing principles. The respondent was aged 27 years at the time of the accident. His injuries left him with a permanent disability at the ratio of 40% or 25% as assessed by the respondent and appellant's doctors respectively. The respondent testified that he worked as a Communication Officer at Coffee

Management Service earning a monthly salary of Kshs. 25,000/- per month. As a result of the accident, PW1, Dr. James Muoki testified that the respondent sustained a deformity on his back which is permanent and residual paralysis on the lower limbs. The doctor further testified that he is unlikely to go back to his previous level of activity as the permanent disability and weakness on his limbs will persist for life. The respondent testified that he was not able to resume working from the year 2022 after the accident and he was currently using a wheel chair as he was paralyzed from the waist going down. The appellant disputed the respondent's net income and submitted that the respondent's income was Kshs. 114,603/- for ten months being an average monthly income of Kshs. 11,460/-.

27. The learned magistrate when arriving at the award of Kshs. 300,000/- relied on the case of **Koyi vs Obanga &**

2 Others (Civil Appeal 73 of 2017) [2022] KEHC 9772 (KLR) (21 July 2022) (Judgment) whereby the appellate court awarded a sum of Kshs. 400,000/- as general damages based on the medical report that assessed permanent incapacitation at 40%.

28. The respondent pleaded loss of earning capacity in his plaint. He tendered evidence to the effect that the injuries affected his income earning ability.

29. It is therefore my considered view that the award of Kshs. 300,000/- is sufficient compensation under the head of loss of earning capacity.

30. It is therefore my considered view that the appeal lacks merit and ought to be dismissed with costs.

31. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 4TH DAY OF DECEMBER 2025.

F. MUCHEMI
JUDGE