



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 343 OF 2024**

**ROSHAN HOLDINGS LIMITED.....**

**APPELLANT**

**VERUS**

**EUSTUS MUGAMBI MWITI.....**

**.....RESPONDENT**

*(An appeal from the judgment of the Chief Magistrates Court in Meru CMCC No. E037 of 2024 delivered on 06<sup>th</sup> November 2024)*

**JUDGMENT**

**Background:**

1. The respondent commenced suit in the lower court seeking general and special damages as a result of injuries he sustained in a road traffic accident that occurred on 28/11/2023 at Kathita area, along Meru-Nkubu road. The respondent's case was that he was lawfully riding motorcycle registration number KMFH 505H when the

appellant's driver so negligently drove motor vehicle registration number KDL 667K that he caused it to veer off and ram into the respondent's motor cycle. The full particulars of negligence were set out in the plaint, as were the nature and extent of the injuries that he sustained.

2. The appellant entered appearance and filed defence. On 23//9/2024 the parties recorded a consent, where the appellant admitted 90% liability, while the respondent conceded 10% contributory negligence. The matter proceeded to assessment of damages and on 6<sup>th</sup> November 2024 the lower court entered judgment as follows:

a) Liability - 90:10

b) Pain and Suffering - Kshs.250,000/=

Loss of amenities - Kshs.150,000/=

Loss of earnings and

loss of earning capacity -

Kshs.100,000/=

c) Future medical expenses - Kshs. 50,000/=

d) Special damages - Kshs.

32,670/=

**Total - Kshs.582,670/=**

**less 10%**

**Net total -**

**Kshs.524,403/=**

e) Costs and interest

### **The Appeal**

3. Aggrieved by the said judgment the appellant filed a Memorandum of Appeal dated 3/12/2024 in which it set out the following grounds: -

I. That the learned trial magistrate erred in fact and in law by awarding an inordinately high amount for general damages of Kshs.550,000/= to the respondent, given the precedence already set in case law and contemporary comparative decisions and authorities in awarding general damages based on comparable injuries sustained by the respondent for reasons stated hereunder;

a) The trial court awarded Kshs,250,000/= for pain and suffering which is contrary to the existing similar cases on similar injuries and the evidence presented in court

particularly the medical report which showed that the plaintiff sustained soft tissue injuries.

- b) The trial court erred in fact and in law by awarding Kshs.150,000 for loss of amenities, given the nature of the injuries suffered by the plaintiff and the existing precedence on similar injuries.
  - c) The learned trial magistrate erred in fact and in law by awarding Kshs.100,000/= for loss earning and loss of earning capacity that were not proved by way payslips or any document showing income of the plaintiff as is the required standard established by leading case laws that loss of earning must be specifically pleaded and strictly proved.
- II. The learned magistrate erred in act and in law by awarding Kshs.32,670.00/= in special damages that were not entirely proved by way of receipts as in the required standard established by leading case laws that special damages must be specifically pleaded and strictly proved.

III. The learned trial magistrate's judgment was wholly not supported in law by evidence tendered in court and legal principles.

4. The appellant sought the following prayers:

- I. The appeal be allowed and trial court's Judgment be set aside including the resultant decree and consequential orders;
- II. This honourable court do proceed to proceed to reassess quantum on general damages for pain and suffering on this matter as per trending case law.
- III. This honourable court do proceed to set aside the award on loss of amenities and find that the nature of injuries sustained by the plaintiff do not warrant an award under this head.
- IV. This honourable court do proceed to set aside the award on loss of earning and loss of earning capacity and find

- that the same have not been proved as is the required standard by law and existing case law.
- V. This honourable court do proceed and reassess the quantum for special damages to be awarded based on the required standard of proof established by leading case laws.
- VI. The costs of the appeal be awarded to the appellant herein.

### **Appellant's submissions**

5. The appellant submitted that the award of general damages was inordinately high, given the nature of injuries sustained by the respondent. To the appellant, an award not exceeding Kshs.100,000/= would suffice.
6. The appellant further submitted that the award for loss of amenities amounted to double compensation for the reason that no evidence was adduced to show that the respondent's normal aspects of life were interrupted. The appellant urged the court to set aside this award. Cited in support of this submission were the following authorities:

**a. Mwaura Muiruri -vs- Suera Flower Limited and Another (2014)) KEHC 676 (KLR)**

**b. Jecinta Kendi and Another -vs- Rose Kimonda (2020) eKLR**

7. On the award of loss of earnings and earning capacity, it was submitted that this was only awardable where a victim, as a result of the injuries sustained, had his chances of securing a job reduced. Cited in support of this submission was **Butler -vs- Butler (1984) e KLR**. That in this case, the respondent suffered minor injuries which healed and he suffered no form of incapacitation.
8. The appellant urged the court to set aside the award under that head entirely.
9. The appellant further submitted that the claim for Kshs.20,000/= for a demand letter was erroneously made since such a letter is not a special damage claim, but a security for an award of costs upon the successful litigation by a party. Cited in support of this particular submission was **Stanely Kanga Nkaricha -vs- Meru Teachers College (2018) eKLR**.

10. On the claim for Kshs.1,200/= for procuring a P3 form, the appellant urged the court to set aside the award as a P 3 form is a public document issued for free. The appellant cited **Legal Resources Foundation Trust vs Attorney General and 2 Others (2019) e KLR.**
11. On the fee for the medical report the appellant submitted that in line with Rule 3(1) (2) and 5 and Schedule of the Medical Practitioners, and Dentists (Professional Fees) Rules 2017 the same ought to be charged at between kshs.6000/= and Kshs.12,000/=.

### **Respondent's submissions**

12. It was submitted that according to the medical report by Dr. Gitura produced in court, the respondent was advised to take a two (2) month rest and so he could not do his normal chores. That the injuries were not mere soft tissue injuries as alleged.
13. It was further submitted that the authorities by the respondent produced before the lower court were in line with the award made by the trial court. That as was stated in **H. West and Son -vs- Shepherd (1967) 2 WLR 1359** money

cannot repair a physical fame that has been battered and shattered. That the award of general damages was thus fair and reasonable.

14. On the award for loss of amenities, the respondent submitted that the same was correctly awarded due to post traumatic disorder that the respondent suffered or was likely to suffer. That the respondent suffered 4% disablement and thus cannot enjoy life as he used to prior to the accident. Cited in support was the case of **Mwaura Muiruri -vs- Suera Flowers Ltd and another (2014) eKLR.**
15. On loss of earning capacity and loss of earnings, it was submitted that the same was correctly awarded since the respondent's chances of getting a job were reduced and that for two months he was on bed rest hence unable to earn a living. The respondent cited **Mumias Sugar Company vs Francis Wanalo (2007) eKLR.**
16. Citing **Jacob Ayiga vs Simon Obayo (2005) eKLR,** the respondent submitted that to find that proof of earnings would require documentary evidence would occasion

prejudice to many Kenyans who earn a living and keep no records.

17. On the award of special damages, the respondent submitted that the same were proven by production of documents in support thereof. That the costs of the demand letter were correctly incurred and not factored in the Bill of Costs hence cannot be termed as double compensation.

### **Analysis and determination**

18. This court's duty is as was spelt out in **Selle and another vs Associated Motor Boat Co. Ltd (1968) EA 123** where it was held that:

***“... This Court must reconsider the evidence, evaluate itself and draw its own conclusions though it shall always bear in mind that it had neither seen nor heard the witness and should made due allowance in that respect ...”*** (

19. The appeal is against the award of damages made by the lower court. It is the appellant's position that first, the

awards under the head of loss of amenities, loss of earning capacity and loss of earnings were erroneously made. Secondly, that the award of special damages in respect to the demand letter was erroneous. Thirdly, that the amount awarded on the medical report and P3 form were erroneous. Lastly, that the damages for pain and suffering awarded by the trial court were inordinately high.

20. I will deal with each award, beginning with the last mentioned above, that of general damages for pain and suffering.

21. It is an accepted principle in law that this court will only disturb an award of the lower court if it finds that the same was made by application of the wrong principles and that the award was inordinately high or low. The mere fact that the appellant could have arrived at a different figure is not sufficient to disturb an award. This was the position in **Kemfro Africa Ltd T/A Meru Express Service and Another -vs- Lubia and Another (1985) eKLR**, where the Court of Appeal held as follows:-

***"The principles to be applied by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must have been a wholly erroneous estimate of the damages."***

22. The same court in ***Bashir Ahmed Butt V Uwais Ahmed Khan [1982-88] KAR 5*** reiterate the said principles and held that;

***"An appellate Court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the***

***evidence in some material respect, and so arrived at a figure which was either inordinately high or low”***

23. From the medical report and the pleadings, the respondent sustained the following injuries:

a) Blunt chest trauma

b) Multiple bruises and abrasions on both forearm, dorsum of both arms, right thigh, knee and leg

c) Tender and swollen right knee joint with reduced range of motion.

24. According to the medical report by Dr. Gitura dated 2/1/2024 which was produced by consent, the respondent's degree of disablement was assessed at 4%. It was not clear whether this disablement was temporary or permanent, since the doctor did not testify.

25. I have looked at the injuries and compared them to those of the claimants in the case cited by the parties before the lower court namely:

**a. Vincent Cheruiyot Rono vs Mombasa Maize Millers LTD (Nakuru HCCC NO (2005))**

**b. Lucy Ntibuka vs Bernard Mutwiri & Others [2007]**

**eKLR**

**c. Mumias Sugar Company Limited vs Francis**

**Wanalo (2007) eKLR**

**d. Bonham Carter vs Hyde Park Ltd [1948] 64 TLR**

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26. In my view, the award under this head was reasonable and within the range of damages awarded for similar cases. It must be remembered that each case is unique and there can't be a one-size-fit-all approach to making such award.
27. On this particular head of damages, I find the appeal unmerited.
28. An award of loss of amenities is awardable in circumstances that were described in **Mwaura Muiruri vs Suera Flowers Ltd and Another (supra)** as follows:

***Damages for loss of amenities are therefore awarded when the ability of the Plaintiff to enjoy certain aspects of his life as a result of the accident are diminished. Essentially the quality of life of the Plaintiff is reduced due to the***

***inability to do the things he would otherwise have done had it not been for the injuries.***

29. In that case the court cited a passage in Halsbury's Laws of England (4<sup>th</sup> Edition Vol. 12(1), at paragraph 884 where it states:

***“In addition to damages for the subjective pain and suffering sustained by a plaintiff by reason of his injuries, damages are awarded for the objective losses thereby sustained by him. These may include loss of the ability to walk or see, the loss of a limb or its use, the loss of congenial employment, the loss of pride and pleasure in one's work, loss of marriage prospects and loss of sexual function. Damages under this head are awarded whether the plaintiff is aware of it or not: damages are awarded for the fact of deprivation, rather than the awareness of it.”***

30. Similarly, in **Peninah Mboje Mwabili -vs Kenya Power and Lighting Company Ltd (2016) e KLR**, the court held as follows:

***“Damages under this heading are awarded where is proved that owing to the injury suffered by the plaintiff, his chances of getting a job in the labour market comparable to the one he held before the injury are diminished or just lowered. It must be differentiated with loss of earning capacity which occurs where there chances of earning are literally erased.”***

31. It is thus clear that an award for loss of amenities is made where certain of aspects of the ability of the injured party’s life are diminished. The onus is on the plaintiff to present such evidence in court.

32. In the instant case, the respondent never testified so the trial court had no evidential basis to make this award as separate head.

33. I am also in agreement with the decision in **Peninah Mboje Mwabili’s case (supra)** that such an award is generally to

be involved in the award for general damages and need not be awarded separately. However, there wouldn't be any prejudice if the trial court opted to make the award under its own sub-head in the award of general damages, provided that there is sufficient evidence to prove the same.

34. In the circumstances of this case, where no evidence was adduced, I find that the award was erroneously made and it is set aside.
35. The trial court made the award for loss of earning capacity and loss of earnings together. In law, these are distinct awards, as was explained in **Fairely -vs- John Thomson Limited [1973] 2 Lloyd's Law Reports** where 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”***

36. The said case was cited in **Butler vs Butler (supra)**, where the Court of Appeal held as follows;

***“Loss of earning capacity 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 by Lord Denning M.R. in **Fairely vs John Thompson (Design & Contracting Division) Ltd [1973] 2 Lloyd’s Rep 40,42(CA).....Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of the general damages.”*****

37. It is thus clear that loss of earning capacity is computed as part of general damages. I don’t think that there is anything wrong if the court decided to break down the award of general damages and make a sub-head for the same.

38. That said, and as earlier stated, the plaintiff did not testify, nor was his statement adopted as his evidence. It is thus my finding that the award for loss of earning capacity was not proven to the requisite standard.
39. As regards loss of earnings, the authorities above have clearly explained that this is a claim for special damages and must not only be specifically pleaded but also proven.
40. The respondent did not provide any proof of the claim and therefore the same is untenable. The entire award is set aside.
41. As regards the claim for Kshs.20,000/= for the medical report, the parties agreed by consent that the same be reduced to kshs.10,000/=. That ought to be the award for that head.
42. As regards the claim for Kshs.20,000/= for the demand letter, I agree that the same is untenable. A demand letter prior to filing suit is necessary so that if successful, the party who sent the demand letter is entitled to costs. The court is empowered to deny a party costs if it is shown that it did not

give any demand or notice of intention to file suit. (see Rule 53 of the Advocates Remuneration Order 1).

43. It is thus untenable for an advocate who acts for a successful party and is awarded costs to charge for the demand letter. That is not a special damage claim, but is computed as part of the instruction fees due to the advocate for the successful party.
44. For the foregoing reasons, the said award of Kshs.20,000/= is set aside.
45. No receipt was tendered for the payment of P3 form so the same is not awardable.
46. The other special damages were proven by way of receipts from the Meru Teaching and Referral Hospital and I allow the same.
47. The claims for future medical expenses was well explained by Dr. Gitura. The same is reasonable and it is allowed at Kshs.50,000/=.
48. In conclusion, the appeal partly succeeds and the judgment of the lower court is set aside and is substituted with judgement as follows:

a. Liability is as agreed at 90%:10%

b. General damages for pain and suffering  
 ....Kshs.250,000/=

c. Costs of future medical expenses  
 .....Kshs.50,000/=

d. Special damages:

i) Medical report  
 Kshs.10,000/=

ii) Hospital expenses  
 .....Kshs.2,670/=

Total  
 Kshs.312,670/=

Less 10%

Kshs.31,267/=

**Net total**  
**Kshs.281,403/=**

e. Each party shall bear its own costs of this appeal.

f. The respondent shall have costs in the lower court and interest thereon.

g. Interest on the above awards shall run from the date of filing suit in respect to the special damages under (c) above and from the date of the lower court judgment in respect to the other awards.

49. It is so ordered.

**Dated, Signed and Delivered at Meru this 13<sup>th</sup> day of February, 2026.**

**H. M. NYAGA  
JUDGE**